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IN THE

Supreme Court of the United States

October Term, 1964

No. 534

ANTHONY PROVENZANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The above-named petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled cause on June 30, 1964, which affirmed a judgment of the United States District Court for the District of New Jersey, convicting petitioner, upon a jury verdict, under a single-count indictment charging a violation of 18 U.S.C. §1951 (the so-called Hobbs Act), entitled "Interference with commerce by threats or violence."

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix B, *infra*, pp. 4a-45a. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1964 (App. B, *infra*, p. 46a). A timely petition for

rehearing filed by petitioner was denied by that Court on July 28, 1964 (App. B, *infra*, p. 47a). Justice Brennan of this Court made an order on August 18, 1964 extending petitioner's time to file this petition for a writ of certiorari to and including September 26, 1964 (App. B, *infra*, p. 48a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the essential element of interference with commerce in a prosecution under the Hobbs Act (18 U.S.C. §1951) is satisfied by a finding simply that the resources of a company engaged in interstate commeree were depleted by the payment of money through extortion.

2. Whether (a) a defendant may be convicted of extortion under the Hobbs Act on the basis of retainer payments made to a third party, an attorney, for unnecessary and fictitious services, where there is no evidence that the defendant knew or contemplated that the attorney would not or did not render any appreciable services, or that defendant shared or benefited from any of the payments, directly or indirectly, or had any association, relationship or even acquaintance with the attorney, and (b) it is error for the District Court to instruct the jury that they could find that the defendant in such circumstances aided and abetted the attorney, where there is no evidence that the attorney was a principal in the alleged crime or conspired or collaborated with the defendant.

3. Whether it is error for the District Court to deny defense counsel's request for inspection of the Grand Jury testimony of key Government witnesses, for purposes of cross-examination, particularly where need is shown therefor and the Court has examined the Grand Jury testimony

in camera and has not determined that there is no inconsistency between the particular witnesses' trial and Grand Jury testimony.

4. Whether it is error for the District Court (a) to direct the sequestration of the jury on the second day of the trial in a criminal case on the basis of an incident attended by highly inflammatory publicity, and (b) to refuse defense counsel's requests for *in camera* interrogation of the individual jurors to ascertain whether any of them had read or heard any of the publicity, and for appropriate instructions to the jury

5. Whether multiple payments obtained over a period of years pursuant to an extorsive scheme constitute a single continuous offense, or separate offenses, under the Hobbs Act.

6. Whether it is error for the District Court in a Hobbs Act prosecution, where the Statute of Limitations is a pivotal issue, to restrict cross-examination of the Government's key witness, the alleged victim of the extortion, by excluding questioning designed to show that that witness' pre-limitation fear did not continue into the period not barred by limitations.

7. Whether it is error for the District Court in a Hobbs Act prosecution for extortion, to refuse to charge the jury that the inducing fear must be a reasonable one under all the circumstances presented.

8. Whether it is error for the District Court in a Hobbs Act prosecution for extortion, to refuse to instruct the jury as to the defendant's theory of defense that if the challenged payments constituted bribery they could not constitute extortion.

Statutes Involved

The statutory provisions and rule involved are 18 U.S.C. §1951, 18 U.S.C. §3282, 18 U.S.C. §2 and Rule 6(e) of the Federal Rules of Criminal Procedure. They are set out in Appendix A, *infra*, pp. 1a-3a.

Statement

The one-count indictment in this case charged petitioner, an officer of Local 560, International Brotherhood of Teamsters, with unlawfully obstructing, delaying and affecting interstate commerce from about January 1, 1952 to and including June 1, 1959 by extorting the sum of $17,100 from an interstate trucking corporation known as Dorn's Transportation Inc. and from a certain Walter A. Dorn, an officer thereof, by the wrongful use of fear of financial and economic injury to the business of the said company, in violation of 18 U.S.C. §1951 (7a-8a).* The indictment was returned on November 15, 1960 (1a), and the crucial date for the purpose of the applicable five year statute of limitations (18 U.S.C. §3282) was November 15, 1955. All the evidence adduced to show criminal acts committed by petitioner related solely to the pre-limitation period, antedating November 15, 1955.

The allegedly extorsive payments on the basis of which petitioner was convicted, consisted of certain monthly retainer payments made by the Dorn Company to a New Jersey attorney named Michael Communale, which, concededly, were "not shown" to have been "received . . . for [petitioner's] benefit" (C.A. Op., App. B, *infra*, pp. 15a, 19a). The Government's case rested on the uncorroborated

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* Figures in parentheses followed by the letter "a", unless otherwise specified, refer to the pages of petitioner's printed Appendix in the Court of Appeals. "C.A. Op." refers to the opinion of the Court of Appeals. Emphasis throughout is supplied.

testimony of Walter A. Dorn, the Dorn Company's vice-president in charge of operations (230a). Though Dorn testified that he also made certain cash payments to petitioner commencing in about June 1952 and continuing until some time in the latter part of 1953 or early 1954, that evidence was submitted to the jury only insofar as it bore on the question of intent (700a-701a).

The Dorn Company moved its New York terminal to Secaucus, New Jersey on January 1, 1952 (175a), and shortly thereafter signed a contract with Local 560, of which petitioner was then a business agent (251a). A dispute early arose as to whether the company was required to have a "switcher" available during the daytime to move the trucks and trailers about the yard; that dispute was resolved by the company's assigning one of its switchers to the daytime shift, without hiring any additional employee (177a-179a).

There was evidence that in early 1952 Dorn's terminal yard became congested (106a, 153a, 195a), but the evidence was conflicting as to the cause of the congestion. Two Government witnesses, Hoeting and Garcia, attributed the congestion to the refusal of the drivers to back their trailers into the terminal bays and drop them (182a, 213a). But they could not point to any specific incident or particular driver (166a-67a, 173a, 196a, 221a), and the Government did not produce a single driver who had refused to back in his truck or had been asked to do so. On the contrary, there was extensive evidence from 24 drivers who testified for the defense (478a-607a), as well as from Government witnesses (88a, 91a, 109a-110a, 114a, 130a, 134a, 166a-167a, 169a), that the congestion was caused by inadequate yard facilities, overcrowding and the traffic and blockage of independent trucks known as "gypsies" which used the yard by arrangement with the owner. There was no evidence

whatever that petitioner had anything to do with the situation or that any of the drivers who had allegedly refused to back in their trucks had done so at petitioner's request or suggestion, and there was affirmative evidence from Government witnesses (114a, 118a, 228a) as well as from defense witnesses (478a-607a), that the situation was in no way attributable to petitioner.

Dorn testified that he never saw the congestion at the terminal, and that he learned about the drivers' alleged refusal to back in their trucks primarily from the then terminal manager, Garcia (236a). According to Dorn, he had one or two meetings concerning the matter with petitioner and another union business agent named Castellito, and they allegedly maintained that the parking of trucks was yard work which the truck drivers were not required to do (235a-237a). At a luncheon meeting thereafter in April or May 1952, arranged by Garcia, Dorn, according to his testimony, asked petitioner and Castellito why "we couldn't get this problem straightened out", stating that it was a situation the company could not live with (238a, 317a). Dorn considered it a joint problem and was seeking their assistance (318a). According to Dorn, petitioner and Castellito stated that he would have to "see them to get it straightened out" (238a). Although no specific amount of money was mentioned (324a), Dorn testified that he "had the understanding" in his own mind "that we were talking about the price of a man", which was about $100 per week (238a). Dorn did not commit himself (325a). According to Dorn, he had a second meeting with petitioner and Castellito about two weeks or a month later (238a, 239a); again no specific sum was mentioned, but in his own mind he again had an "understanding" that he had "committed himself" to $100 a week "if it were possible" (239a, 240a, 326a).

After the second meeting Dorn never again discussed the problem with petitioner or Castellito (240a). He testified that thereafter, about June 1952, at a restaurant where he had had the two previous meetings, he gave petitioner about $350 to $400 in cash (231a, 239a, 305a). He "felt it was necessary" to the "operation" of the business; that the operation had become expensive and service suffered (241a, 249a). According to Dorn, he made three additional cash payments of like sums to petitioner over an estimated period of about 15 months (231a-232a, 320a), or perhaps longer (305a), and possibly extending into 1954 (303a).

Dorn testified that some time late in 1953 or in 1954 he told petitioner that he could not make any further payments to petitioner and the cash payments were stopped (247a, 331a), and that petitioner made no threats or demand or request for money or anything of value (332a-333a, 303a).

Dorn further testified that prior to the stopping of the cash payments (307a) and during the second quarter of 1953, at another meeting at the same restaurant, petitioner gave Dorn a slip of paper containing the name of one Michael Communale, an attorney, and stated to Dorn: "I have a lawyer for you" (241a-243a, 244a-245a). Dorn remarked that the company paid its upstate New York lawyer $200 a month, and nothing further was said (232a-233a, 242a-243a, 244a, 245a). That was the extent of the conversation concerning the matter, either then or thereafter, and there was no demand by petitioner that the attorney be retained, "nor was there any discussion of the retainer fee" (243a, 248a, 387a). Dorn claimed, however, that he related this incident in his own mind to his conversation with petitioner of about a year earlier when he had allegedly said that he would "do what [he] could" to pay $100 per week "if there was a way [he] could do it" (244a,

371a-372a). But nothing to this effect was said to petitioner either then or thereafter, this conclusion being only the operation of Dorn's mind (245a, 248a, 387a).

Commencing June 1, 1953, and through June 1, 1959, the Dorn Company sent monthly retainer checks of $200 each to Communale, except that for a period of five months commencing in September 1953, the monthly checks were $400 each (233a, 295a-296a; Ex. G-6). Dorn wrote Communale a letter retaining him as an attorney for the company on August 10, 1953 (241a; Ex. G-9). While Dorn testified on direct examination that he got the "information" for "the substance of the letter" from petitioner (243a), he made it clear on cross-examination that the contents of the letter were the products solely of his, Dorn's, own imagination, and the only information he received from petitioner was Communale's name and address (382a-383a). On April 5, 1957 Dorn wrote Communale a letter terminating the retainer as of May 1, 1957, which was accepted by Communale by letter dated April 9, 1957 (287a-289a; Exs. D-28, D-29). Despite this exchange of correspondence, the monthly retainer payments were continued to June 1, 1959 (233a, 249a), apparently simply because Dorn omitted to instruct the company's bookkeeping department to stop the payments (295a).

Dorn never met or talked to Communale, or used his services (242a, 245a-246a). He did not disclose any reason for the retainer to anyone in the company (333a, 334a).

Communale was at the time an assistant prosecutor for Hudson County, but was permitted to practice law and maintained an office for his private law practice in Jersey City (390a). Testifying as a Government witness, Communale admitted that he did not know Dorn and never met him during the entire period of the retainer, and that he

performed only minor and superficial legal work for the Dorn Company (390a, 395a, 398a-402a).

Communale further testified, however, that during the entire period of the retainer payments, he did not know or meet or speak with petitioner, meeting him for the first time on only a single occasion in 1959 after he had been required to testify before a Congressional committee concerning the matter (396a, 418a). He never discussed the retainer with petitioner (396a, 418a-419a), or with the attorney for Local 560, one Friedland, who had offices on the same floor with Communale and whom Communale knew (417a-419a). Communale testified that all of the retainer checks were either cashed by him or deposited to his account, and that he "absolutely" did *not* give any of the money to petitioner or Friedland or to any other person, but personally used it all (408a, 412a-13a, 415a).

According to Communale, the Dorn retainer was obtained for him by one Orestes Cicarelli, a disbarred attorney who worked in his office, and who died in 1957 (406a-407a, 414a). He defended the retainer arrangement as entirely proper and legitimate, since he held himself out as "ready, willing and able at all times" to render any services that the Dorn Company might request of him (416a-17a).

There was, in fact, a complete absence of evidence to show that petitioner knew or had any dealings or association with Communale, or shared or benefited from the retainer payments, or knew that Communale was receiving such payments or was not rendering any services therefor, or that Communale knew, if it was so, that petitioner had anything to do with his being retained.

Dorn unequivocally testified that though he had many meetings with petitioner during the years in question, from 1952 to 1959, on an average of four or five times a year, no mention was ever again made of Communale's name at

any of such meetings following the initial occasion when Dorn allegedly received the name from petitioner (381a, 388a). Dorn further testified that he never told petitioner that he was sending checks to Communale (295a); that petitioner had nothing to do with the increase of the monthly retainer payments from $200 to $400, and that it was never discussed between Dorn and petitioner (296a); and that they likewise in no way discussed the matter of Dorn's sending Communale the letter terminating the retainer arrangement in April 1957 (293a).

While Dorn testified that he made the payments to Communale *"in the first place"* because he felt "it was necessary for the continuance of the terminal" (249a), there was no evidence that he continued to be so motivated after his announced refusal in the latter part of 1953 or in 1954 to make any further payments to petitioner. The evidence showed that the issuance of the retainer checks proceeded on a purely mechanical and automatic basis, following Dorn's initial instructions to the bookkeeping department to make the monthly payments to Communale. In accordance with the practice involving weekly or monthly charges of less than $1000, the company's bookkeeper, Lindquist, automatically continued to run the checks each month through the checkwriter without receiving any further instructions therefor from any officer of the company (71a-72a). The machine itself imprinted the authorized signatures on the checks; and Dorn did not personally sign any of the checks and was not consulted with respect to their continued issuance (71a-72a, 74a).

Dorn further testified that labor conditions at the terminal in Secaucus did not improve measurably after he made his first cash payment to petitioner (251a); that petitioner never rendered any special favors for Dorn or his company

throughout the years in question and that he never asked petitioner for any special favors (301a-302a); that whatever labor matters he handled with petitioner throughout these years "were handled as they are in normal course of business" (302a); and that petitioner never asked him for any money and never asked him to do anything in return for doing something "irregular or extra" (303a-304a).

Petitioner testified in his own behalf and flatly denied that he had any conversations with regard to the alleged refusal of the drivers to back in their trucks (620a), or that he ever received any money from Dorn (619a), or that he knew Communale or ever gave Communale's name to Dorn or had any knowledge whatever concerning the Communale retainer or payments or in any way shared in any such payments (622a-624a, 627a).

Additional facts are set forth in connection with the discussion of the questions here raised.

Reasons for Granting the Writ

1. Question Relating to the Element of Interference with Commerce

A highly important question is here presented as to the proper standards for a finding of the essential jurisdictional element of interference with commerce in a Hobbs Act prosecution. In *Stirone* v. *United States*, 361 U.S. 212, 218 (1960), this Court made it clear that that element is an essential component of a Hobbs Act crime, separate and apart from that of extortion, and is "critical since the Federal Government's jurisdiction of this crime rests only on that interference."

The Trial Court, however, in its charge, in effect eliminated that element from the jury's consideration by instructing that the jury could "infer" the requisite inter-

ference with commerce merely upon finding that money was obtained by extortion from a company engaged in interstate commerce, on the theory that its resources were thereby depleted (695a-696a, 711a).

As shown above, there was a sharp conflict in the evidence as to whether there was a condition of congestion at the Dorn terminal caused by the refusal of drivers to back their trucks into the terminal bays. That question was crucial since it was Dorn's testimony that the alleged extorsive payments were made in an attempt to resolve that alleged problem. The defense adduced extensive evidence that the congestion was caused instead by inadequate yard facilities, overcrowding and the traffic and blockage of independent trucks.

The Trial Court, however, charged the jury that "This evidence of congestion does not bear directly on the issue of whether or not extortion did in some way or degree obstruct or delay or affect commerce", and that it was unnecessary for the jury to find "with respect to the congestion that any particular shipment of freight moving in or out of the Secaucus yards was obstructed or delayed" (711a). The Court further charged that so long as the jury found "that money was obtained" from the Dorn Company "by way of extortion" at the instance of petitioner, the jury could "infer from that fact that payments of money made did in some way or degree obstruct or delay or affect the business in which Dorn's Transportation, Inc., was engaged" (695a-696a). The Court went on to state that "It is the depletion of the resources of a business by extortion which permits as a reasonable inference if the extortion is established that its operations are delayed, obstructed, affected" (711a). Exception was specifically taken to these portions of the charge (718a, 719a, 721a, 723a).

Manifestly, proof merely of extortion of money serves to establish only one of the elements of a Hobbs Act crime; namely, extortion. It in no way serves to establish the other vital element of interference with commerce. In *Stirone*, this Court aptly noted, in allusion to that element of the offense, that the victim of the alleged extortion was entitled to "the Hobbs Act's protection against *interruption* or *stoppage* of his commerce in sand by extortion" (361 U.S. at 215). This Court there further made it clear that it was essential for the jury to find, on sufficient evidence, that "*commerce was saved from such a blockage* by [the victim's] compliance with [the defendant's] coercive and illegal demands" (361 U.S. at 215). Such a finding, on adequate evidence, this Court ruled, would satisfy the element of interference with commerce.

In the present case, however, the issue as to whether commerce was saved from a threatened interference or blockage by Dorn's compliance with petitioner's alleged coercive demands was not submitted to the jury at all: The jury was, instead, instructed that the evidence of congestion was to be considered only in determining whether it "aroused anxiety on the part of Dorn" (710a)—i.e. insofar solely as it related to the issue of extortion—, and that it did "not bear directly" on the issue of interference with commerce (711a). The effect was not only to take away from the jury's consideration an essential element of the crime (*cf. Roe* v. *United States*, 287 F. 2d 435, 440-1 [5th Cir., 1961], cert. den. 368 U.S. 824 [1961]; *United States* v. *Gollin*, 166 F. 2d 123, 126-7 [3d Cir., 1948], cert. den. 333 U.S. 875 [1948]), but also to deprive petitioner of an extremely important facet of his defense.

While the Court of Appeals in its opinion (App. B, *infra*, pp. 33a-34a) purported to follow *Stirone*, its decision actu-

ally sustains a conviction under the Hobbs Act without a finding of the essential jurisdictional element of interference with commerce, in direct conflict with *Stirone*.

2. Questions of Knowledge, Intent and Aiding and Abetting

Important questions are here presented as to the requisite elements of proof in a Hobbs Act prosecution, and specifically whether intent to commit extortion may be established without any showing of benefit to the defendant, direct or indirect, and without proof of the knowledge required for a finding of intent, and whether there may be imputed to the defendant the knowledge of another person who is not shown to have conspired or collaborated with the defendant.

A.

The case was submitted to the jury on the theory that petitioner had induced by fear the payments made to the attorney Communale "for unnecessary, fictitious services" (695a), and the Court of Appeals stressed that there was "ample evidence from which the jury could infer that the so-called 'retainer' was a mere fiction, a fraud, a palpable cover-up device for successful extortion" (App. B, *infra*, p. 19a).

The evidence was, however, clearly insufficient to establish petitioner's intent to induce the payment of monies to the attorney Communale "for unnecessary, fictitious services". There was thus not a shred of evidence to show that petitioner had any knowledge that Communale was receiving retainer payments without rendering services therefor (or that he was retained or receiving payments at all), or that petitioner intended or contemplated that Communale was to be retained on any such basis.

All that the Government proved was that petitioner had given Communale's name to Dorn as a lawyer whom Dorn could retain. There was no demand made by petitioner that Communale be retained, nor was there any discussion of any retainer fee for Communale, except for Dorn's own volunteered statement that his company paid its up-state New York lawyer $200 per month.

Certainly, the mere fact of the giving of the name of a lawyer to Dorn and even suggesting his employment would be insufficient to show that petitioner intended extortion, particularly where, as the Court of Appeals here acknowledged, "it is not shown that [the lawyer] received [the retainer payments] for [petitioner's] benefit" (App. B, *infra*, p. 19a). In and of itself the evidence was fully consistent with the hypothesis that petitioner was, without any criminal intent, merely suggesting the name of a lawyer whom the Dorn Company was free to engage, or not engage, as it saw fit, under a normal attorney-client relationship. The undisclosed functioning of Dorn's mind at the time, howsoever relevant to show his fear, would manifestly not suffice as proof of petitioner's intent.

This Court has uniformly condemned the practice of attempting to prove criminal intent "by piling inference upon inference", and of inferring criminal intent without the requisite clear and unequivocal showing of "the knowledge" without which "the intent cannot exist." See *Ingram v. United States*, 360 U.S. 672, 680 (1959).

Yet that is exactly what the courts below have done here. From the proof that Communale received payments without rendering services, they have drawn the inference that the retainer was a "cover-up device" for extortion, and have then gone on to draw the further inference that by suggesting Communale's employment, petitioner intended the use of the retainer as an extorsive "device". That

reasoning, however, is necessarily fallacious since it presupposes that petitioner knew that Communale would not and did not render any services for the retainer payments, and there is no evidence thereof at all. Manifestly, Communale's knowledge could not be imputed to petitioner, since there is no evidence that Communale in any way conspired or collaborated with petitioner or even knew him, or that Communale knew that petitioner had anything to do with the retainer.

The insufficiency of the evidence is further highlighted by the absence of proof that petitioner benefited even indirectly from the extorsive payments. This Court's holding in *United States* v. *Green*, 350 U.S. 415, 420 (1956), that it is no defense to a Hobbs Act indictment that the defendant did not obtain any "*direct* benefit" from the payments, implies that at the very least an *indirect* benefit must be conferred, to warrant a finding of criminal intent. In *Green* the defendants were indirectly benefited by the payments received by their union's members for unnecessary and fictitious services. No such situation was, however, here presented, and the Trial Court erroneously charged the jury that petitioner could be convicted even though he derived no direct or *indirect* benefit from the payments to Communale (695a).

B.

The Trial Court compounded its error by giving an extensive instruction to the jury that petitioner could be found guilty on the theory of having aided and abetted another to commit the crime charged in the indictment "without proof that he personally did every act constituting the offense charged" (696a-697a). That instruction clearly referred solely to Communale. It had no relevant application to Castellito, the other union business agent,

as suggested by the Court of Appeals (C.A. Op., App. B, *infra*, p. 31a), since Castellito was not shown to have committed any act that was not committed also by petitioner.

The aiding and abetting instruction served the impermissible purpose of advising the jury that any missing element in the proof against petitioner "personally"—such as the lack of proof that he shared in or even knew of the retainer payments to Communale, or knew that Communale was not rendering any services therefor—could be supplied by evidence of Communale's own conduct and knowledge, on the theory that petitioner had "aided and abetted" Communale.

It is error to instruct that a defendant may be convicted as an aider and abettor, unless there is evidence that one other than the defendant is a principal in the commission of the crime. *Morgan* v. *United States*, 159 F. 2d 85, 87 (10 Cir. 1947); *United States* v. *Horton*, 180 F. 2d 427, 430-1 (7th Cir. 1950); *United States* v. *Tornabene*, 222 F. 2d 875, 877-8 (3d Cir. 1955). "In other words, one cannot be an aider and abettor of himself in the commission of an offense." *Morgan* v. *United States*, *supra*, 159 F. 2d at 87. It is further requisite that there be proof of collaboration between the person sought to be charged as an aider and abettor and the other claimed participant in the crime. *United States* v. *Moses*, 220 F. 2d 166, 169 (3d Cir. 1955); *Morei* v. *United States*, 127 F. 2d 827, 831 (6th Cir. 1942).

The submission to the jury of the theory of aiding and abetting was thus error since, as shown above, there was no evidence that Communale was a principal in the alleged crime or that there was any collaboration between him and petitioner. The position of the Court of Appeals that this "particular ground of objection . . . was not brought to the attention of the court" (App. B, *infra*, p.

27a), is refuted by the record, which shows that associate defense counsel specifically called the court's attention to its error in charging petitioner as a possible aider and abettor of Communale as a purported principal (724a). Moreover, the Trial Court exhibited marked impatience when exceptions to the charge were being taken, and suggested that counsel enter a "general exception" to the entire charge (720a, 721a, 722a, 723a). The Court of Appeals further exercised its discretion to review this aspect of the charge under Rule 52(b) of the Federal Rules of Criminal Procedure, and erroneously concluded that there was no prejudicial error (App. B, *infra*, pp. 28a-32a).

3. Access to Grand Jury Testimony of Key Government Witnesses

Petitioner's counsel duly requested the District Court to make available to him, for purposes of cross-examination, the Grand Jury testimony of the Government witnesses Walter A. Dorn, Cornelius Hoeting and Joseph M. Adelizzi (211a, 357a-358a, 361a-362a; App. C, *infra*, pp. 49a-54a). The request in each instance was made after the conclusion of the particular witness' direct examination, and the Court denied the request after reviewing the witness' Grand Jury testimony (357a-358a, 361a-363a). Nowhere, however, did the Court state that it found no inconsistencies between the witness' Grand Jury and trial testimony. The Court, instead, placed its ruling on the ground that denial of counsel's request would not subject petitioner to any "manifest injustice" or "deprivation of any substantial right", and that in view of the extensive cross-examination preceding its ruling, the Court did "not find in a review of those minutes that there would be any matter of substantial nature which could be the subject of any further cross-examination that would be beneficial in the defendant's case" (357a-358a, 361a-363a).

Dorn was the Government's key witness, and the relevance of his Grand Jury testimony to the subject matter of his trial testimony was conceded by the Government (App. C, *infra*, p. 51a), and also established by Dorn's own testimony (253a-256a). "Particularized need" for access to Dorn's Grand Jury testimony, within *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), was shown by Dorn's inability to recall, on cross-examination, whether he had testified in his Grand Jury appearances—as he did at the trial—to the crucial matter of his having discussed with petitioner the matter of drivers refusing to back their trucks into the bays in the Dorn terminal (308a-310a; App. C, *infra*, p. 55a). *Cf. Jencks* v. *United States*, 353 U.S. 657, 667 (1957), where this Court pointed out that inconsistency between a witness' trial testimony and his prior version of the facts may consist not only of "flat contradiction", but also of "omission" from the prior version "of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment . . .".

Hoeting was another important Government witness who testified about the congestion in the Dorn terminal in early 1952, allegedly caused by the refusal of the drivers to back their trucks into the bays. He admitted, on cross-examination, that in his testimony before the Grand Jury he had not said anything about congestion in the terminal during the period in question (202a, 203a, 204a). That admission did not remove the need for resort to the "best evidence" —the relevant Grand Jury testimony itself. *Gordon* v. *United States*, 344 U.S. 414, 420-1 (1953). Further, the prosecutor sought to weaken the force of the inconsistency by suggesting that the witness might not have been asked the particular question in the Grand Jury (202a).

The question here presented is one of great importance in the conduct of Federal criminal trials. For one thing,

it raises again the issue on which this Court divided, five-to-four, in *Pittsburgh Plate Glass Co.* v. *United States, supra*, 360 U.S. 395—i.e., whether controlling considerations of policy and logic demand that access to a Government witness' Grand Jury testimony is to be determined by the same considerations as were applied by this Court to a Government witness' pretrial statement in *Jencks* v. *United States, supra*, 353 U.S. 657. The injustice of denying defense counsel access to a Government witness' Grand Jury testimony relevant to the subject matter of his trial testimony, was forcefully expounded by Justice Brennan in his dissenting opinion in *Pittsburgh Plate Glass Co.* (360 U.S. at 407-10), and it is respectfully submitted that this Court should reconsider the entire question. The present situation further bears directly on the question left open in *Pittsburgh Plate Glass Co.*, as to what the rule should be where defense counsel requests the Trial Court to review the Grand Jury minutes *in camera* (360 U.S. at 401). Also involved is the sufficiency of the showing here made of "particularized need."

It is noteworthy that in the interim since *Pittsburgh Plate Glass Co.*, the New York courts have by their decisional law adopted the principle of the *Jencks* decision and extended it to Grand Jury testimony as well as pretrial statements.* This Court has only recently, in an analogous situation, involving the constitutional rights of an accused, accorded great weight to decisions of the New York courts

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* *People* v. *Rosario*, 9 N.Y. 2d 286, 289 (1961); *People* v. *Wilson*, 16 A.D. 2d 207, 208 (1st Dept. 1962); *People* v. *Monahan*, 21 A.D. 2d 76, 78-9 (4th Dept. 1964); *People* v. *Surita*, 18 A.D. 2d 1064 (1st Dept. 1963). The New York courts have thereby adopted the views expressed by Justice Brennan in his dissent in the *Pittsburgh Plate Glass Co.* case. "Prior scrutiny by the Trial Judge . . . has been eliminated as a condition of disclosure" (*People* v. *Wilson, supra*, 16 A.D. 2d at 208), and it "is no longer necessary to show consistency or inconsistency but rather only relevancy" (*People* v. *Monahan, supra*, 21 A.D. 2d at 78-9).

adopting views previously advanced by dissenting Justices of this Court. *Escobedo* v. *Illinois*, 378 U.S. , 12 L. ed. 2d 977, 983-4 (1964); see also *Massiah* v. *United States*, 377 U.S. 201, 205 (1964).

Though the question here raised was not presented to the Court of Appeals below, that is no bar to review by this Court. As was held in *Silber* v. *United States*, 370 U.S. 717 (1962), this Court has the power to review questions not raised in the Court of Appeals which involve "plain error" or errors that "otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

The Court of Appeals of the Third Circuit has indeed clearly indicated its views on the question here presented, and there is a direct conflict between that Court and the Court of Appeals of the Second Circuit. The Second Circuit Court of Appeals has thus held that upon request by defense counsel, the Trial Court should examine the Grand Jury testimony of a Government witness and "if inconsistencies be found should make such portions of the minutes available to defense counsel": *United States* v. *Giampa*, 290 F. 2d 83, 85 (2d Cir. 1961). A similar rule prevails in the District of Columbia. See *Simmons* v. *United States*, 308 F. 2d 324, 325 (D.C. Cir. 1962). The Third Circuit Court of Appeals, on the other hand, has flatly disapproved that approach (*United States* v. *Boyance*, 329 F. 2d 372, 376-7 [3rd Cir. 1964]; *United States* v. *Bertucci*, 333 F. 2d 292, 297 [3rd Cir. 1964]), and the prosecutor in the instant case opposed release of the Grand Jury minutes on the basis of the Third Circuit rulings (R. 657-8; App. C, *infra*, pp. 51a-52a). The Third Circuit Court of Appeals has further held—we submit erroneously—, as did the Trial Judge in the instant case (358a), that a cogent consideration warranting denial of access to Grand Jury minutes is that the particular witness was subjected to intensive cross-

examination even without the use of such minutes. (*United States* v. *Boyance, supra,* 329 F. 2d at 377). Review by this Court is thus further warranted by reason of the conflict in decisions between the several circuits.

The entire question is certainly worthy of further consideration by this Court, particularly since the instant situation bears directly on the question left open in *Pittsburgh Plate Glass Co.* Consistently with the Third Circuit's rulings, the Trial Judge, as noted, denied the request for inspection without making any determination that there was no inconsistency between the witnesses' trial and Grand Jury testimony. Moreover, as Justice Brennan pointed out in his dissent in *Pittsburgh Plate Glass Co.,* it is incompatible with proper standards for the administration of criminal justice in the Federal courts, under this Court's *Jencks* rationale, to permit the Trial Judge to deny access to the relevant Grand Jury testimony of a Government witness upon his *ex parte* determination that such testimony would not "be useful for purposes of impeachment" (360 U.S. at 408-10).

4. Sequestration of the Jury

On the morning of May 24, 1963, the second day of the trial, one Walter Glockner, a shop steward of the Dorn Company, and a member of petitioner's Local 560, was shot to death in front of his home in Hoboken, New Jersey. The shooting occurred between 6 and 6:30 A.M. (139a; see also C.A. Op., App. B, *infra,* p. 35a, fn. 13). At 9 A.M. the Government prosecutor issued a statement to the press that the murdered man "was to be interviewed by our office today and as a potential witness" (76a). According to the Hoboken police, Glockner had in a dying declaration attributed responsibility for the shooting to petitioner (75a). The incident was given quick and wide coverage by the

news and communications media (78a, 137a, 473a, 755a). A person falsely described by the press as petitioner's brother-in-law was arrested as a material witness (137a), and there was a stream of prejudicial radio and television broadcasts and newspaper articles charging responsibility for the shooting to petitioner (755a).

On the basis of this incident, the prosecutor, at the opening of the afternoon session on May 24, renewed a motion for sequestration of the jury which he had made at the opening of the trial and on which the Court had reserved decision (40a-43a, 75a-76a). After some discussion, and after petitioner's counsel had handed up to the Court a newspaper account of the shooting (78a), the Court directed the sequestration of the jury and stated that the jury had in fact been sequestered since the previous recess and had had lunch in the jury room (79a). Petitioner's counsel moved for a mistrial on the basis of the prejudicial impact of the sequestration order, and that motion was denied (81a). He thereafter alternatively requested that the Court separately question each juror *in camera* as to whether he had "heard, seen or read anything about the Teamsters' union, Mr. Provenzano or the Dorn Transportation Co., or any of its employees since the commencement of the trial" (755a-756a, 83a, 136a-138a), noting that since the incident had occurred between 6 and 6:30 A.M. one or more jurors might have heard a report of the incident on one of the early morning radio news broadcasts before coming to court (139a). The Court, however, refused that request (138a-139a), and also refused counsel's further requests to instruct the jury, among other things, that the sequestration order was not occasioned by "any act or statement" of petitioner or his attorneys, and was not to be accorded any special significance by the jury (754a, 752a, 724a).

In connection with the order for sequestration, the Court initially stated that it had directed the marshal "to keep from the jurors all newspapers, all access to radio, television programs or any other sources of information which it would not be appropriate for the jurors to have" (129a). Two days later, however, the Court stated that it had decided to relax these restrictions, and to allow the jurors to see monitored television programs and previously screened newspapers (135a-136a). Counsel protested that monitored T.V. would not insulate the jury from spot news flashes and that newspapers with portions clipped out would only serve to arouse the jurors' curiosity (137a). While the Court thereafter stated that "adequate effective measures" had been taken to prevent jurors from receiving "outside communications" (146a), it did not indicate what those measures were, and it refused counsel's request that its instructions to the marshal be placed upon the record (137a-138a).

Fundamental issues are here presented, affecting the conduct of Federal criminal jury trials and the defendant's right to a fair trial before a free and untrammeled jury. *Cf. Remmer* v. *United States,* 350 U.S. 377, 381-2 (1956); *id.,* 347 U.S. 227, 229 (1954).

It has been aptly declared that "Under modern conditions juries are customarily permitted to separate, even over weekends, and unless there be exceptional circumstances, they should be permitted to do so." See *Coppedge* v. *United States,* 272 F. 2d 504, 507 (D.C. Cir. 1959); see also *United States* v. *Davis,* 103 Fed. 457, 468 (6th Cir. 1900). Sequestration of the jury is obviously a drastic measure. It undoubtedly has the effect of causing the jury to speculate that it is attributable to some questionable conduct on the part of the defendant or his counsel, particularly where, as here, the sequestration was not directed

until the second day of the trial. The Court of Appeals here indeed recognized that "it is conceivable that jurors . . . might entertain some hostility against a person or persons who caused them prolonged confinement" (App. B, *infra*, p. 40a). An order of sequestration would also tend to give the jury the prejudicial impression that the case on trial is for some reason one out of the ordinary. The Court, however, erroneously refused even to give appropriate instructions to the jury, as requested by petitioner, to minimize the prejudicial impact of the sequestration.

Especially since the trial was at the time in its initial stage and the Government would not have been prejudiced by the declaration of a mistrial and the continuance of the case for a reasonable time, as requested by petitioner (77a), it was an abuse of discretion for the Court to resort to this drastic expedient, over petitioner's objection, for the purported purpose of protecting his right to a fair trial.

At the very least the Court should have granted defense counsel's request for *in camera* interrogation of the jurors to ascertain whether any of them had read or heard any of the prejudicial publicity. It has thus been held by the Courts of Appeals in other circuits that protection of the defendant's right to a fair trial demands that the trial court "call the attention of the jurors specifically to the *possibility*" of prejudicial publicity which might come to the jurors' attention (*Coppedge* v. *United States*, *supra*, 272 F. 2d 504, 508; *United States* v. *Accardo*, 298 F. 2d 133, 136 [7th Cir. 1962]); and that where the *possibility* exists that such prejudicial publicity did come to the jurors' attention, it is the duty of the Court "to interrogate the members of the jury to ascertain whether they had seen the newspaper article, and if so, whether it had created

any prejudice in their minds." *Marson* v. *United States*, 203 F. 2d 904, 911 (6th Cir. 1953); *United States* v. *Accardo*, *supra*, 298 F. 2d 133, 136.

The record here reveals that there was a distinct possibility that some of the jurors heard an early morning newscast concerning the incident in question prior to their coming to court. There was also the possibility that some of the jurors were exposed to the prejudicial publicity while they were watching television even during the period of sequestration. The mere fact that the jurors were permitted to see only monitored television programs would not insulate them from spot news broadcasts which sometimes come on without advance warning during the course of otherwise innocuous television programs (137a). The requested interrogation of the jurors could have been readily accomplished without serious interruption of the trial and would have served the vital purpose of insuring that petitioner would be judged by a jury free of any improper extraneous influences.

5. Unit of Prosecution

A conflict between circuits is here involved as to whether multiple payments obtained over a period of years pursuant to an extorsive scheme, constitute a single continuous offense under the Hobbs Act, as held by the Third Circuit in this case (App. B, *infra*, pp. 14a-15a), or separate offenses, as held by the Second Circuit in *United States* v. *Tolub*, 309 F. 2d 286 (2d Cir. 1962).

In *Tolub*, which as here, was a Hobbs Act prosecution for extortion, the Second Circuit held that each payment constituted a separate offense. The Court thus wrote:

> "The payments were not installments of a lump sum. Each payment proceeded from a separate extortion. * * * Just as in those situations where each of many

> acts forwarding a single underlying purpose was a separate offense we think that each acceptance of payment by Tolub during the continuance of the same underlying conditions was a separate act of extortion'' (309 F. 2d at 289).

The rule that each payment gives rise to a separate offense has also been followed in prosecutions under 29 U.S.C. §186(b), relating to unlawful payments by an employer to a representative of employees. *United States* v. *Keegan*, 331 F. 2d 257 (7th Cir. 1964); *United States* v. *Alaimo*, 297 F. 2d 604 (3rd Cir. 1961), cert. den. 369 U.S. 817. A similar rule has also been followed under other Federal criminal statutes, that each act which completes a crime, even though it arises from a common scheme or plan, must be separately charged. See, e.g., *Badders* v. *United States*, 240 U.S. 391 (1916); *Blockburger* v. *United States*, 284 U.S. 299 (1931); *Patton* v. *United States*, 42 F. 2d 68 (8th Cir. 1930); *Halverson* v. *United States*, 162 F. 2d 308 (9th Cir. 1947).

Where the case involves, not a single crime, but rather a series of crimes, and the multiple offenses charged are combined in one count, the indictment is fatally duplicitous. See *Epstein* v. *United States*, 271 Fed. 282 (2d Cir. 1921); *Ammerman* v. *United States*, 216 Fed. 326 (8th Cir. 1914); *cf. Kotteakos* v. *United States*, 328 U. S. 750 (1945).

Where, as here, the prosecution is for multiple offenses, not only must each offense be separately charged, but the ''same underlying [extortionate] conditions'' must be shown to have existed at the time each payment was made. *United States* v. *Tolub*, *supra*, 309 F. 2d at 289. In other words, the elements of the offense—namely, threats, fear and intent—must exist at the time of each payment—or separate offense—in order for the offense to have been committed. In this case, however, there was a complete

absence of evidence of fear as respects the payments made during the post-limitation period, upon which alone petitioner was convicted. The Court of Appeals here indeed recognized that if it adopted the separate offense approach, the indictment would have been rendered "inoperative" (App. B, *infra*, p. 14a).

Petitioner was further prejudiced by the District Court's charge to the jury on the theory of a single continuing offense. The Court thus specifically directed the jury's attention only to the question whether the original retainer agreement in the pre-limitation period was procured by fear, and authorized them to convict petitioner upon a finding of such initial fear and upon a further finding merely that payments were made in the post-limitation period pursuant to the original retainer agreement (702a). The Court nowhere clearly charged that the jury could convict only upon finding that the post-limitation payments themselves were impelled by fear.

6. Restriction of Cross-Examination

Another question of substantial importance in the administration of Federal criminal justice in Hobbs Act prosecutions is here presented. The courts below, in restricting defense counsel's cross-examination of the Government's key witness Dorn, thus departed from the settled rule in Hobbs Act prosecutions that the evidentiary rules barring questions which seek the expression of an opinion or conclusion from a lay witness are relaxed to the extent that testimony may be adduced "showing the state of mind of the victim". *United States* v. *Stirone*, 311 F. 2d 277, 280 (3d Cir. 1962), cert. den. 372 U.S. 935 (1963); *United States* v. *Tolub*, 309 F. 2d 286 (2d Cir. 1962); *United States* v. *Compagna*, 146 F. 2d 524, 529 (2d Cir. 1944), cert. den. 324 U.S. 867 (1945).

One of the critical questions in this case was whether Dorn's original pre-limitation fear continued as the motivation for the post-November 1955 retainer payments. There was no affirmative evidence of such continued motivation; Dorn testified to his feeling of fear only as of the time when he initiated the retainer arrangement with Communale in the second quarter of 1953, the issuance of the monthly checks having thereafter proceeded on a mechanical basis (*supra*, p. 10).

In an attempt to show that any initial connection between the 1952 fear-generating conversations and the commencement of the retainer arrangement with Communale came to an end when Dorn advised petitioner, in the latter part of 1953 or in 1954, of his refusal to make any further payments to petitioner (331a), defense counsel put the following question to Dorn, to which objection was sustained by the District Court (333a):

> "Q. So that any arrangement that you had to pay him [petitioner] money ended when you said you wouldn't pay it any more in 1954, isn't that right?"

Petitioner was thereby prejudicially denied the opportunity to probe the state of mind of the alleged victim Dorn as of the critical period here involved. The Court of Appeals in its opinion recognized the crucial nature of the question to which objection was sustained, but nevertheless upheld the District Court's ruling on the untenable ground that the question "called for a legal conclusion which lay within the province of the court", i.e., "an opinion by Dorn, a layman, as to whether or not a contract had been brought to an end" (App. B, *infra*, pp. 22a-23a).

It is clear, however, that the question was not objectionable as seeking Dorn's expression of an opinion or conclusion. The issue had nothing whatever to do with whether

any "contract" had been brought to an end, but related rather to Dorn's state of mind, and specifically whether he was still motivated by fear at the time involved.

The Government itself elicited testimony from Dorn, on direct examination, as to his state of mind as of the time that he received the name of Communale from petitioner and decided to retain Communale. The Government's theory was that the retainer payments to Communale were merely another method of making payments to petitioner. It was therefore material for petitioner to ascertain whether Dorn's state of mind at the time of his announced refusal to make any further payments to petitioner was such that he meant to terminate *all* the arrangements to make the extorsive payments, including the payments through the medium of the retainer arrangement with Communale. The Court's refusal to permit such inquiry was an undue restriction of petitioner's fundamental right of cross-examination. Cf. *Alford* v. *United States*, 282 U.S. 687 (1931); *United States* v. *Cardillo*, 316 F. 2d 606, 610-11 (2d Cir. 1963).

7. Reasonable Fear

Another important question is here presented respecting the element of fear in a prosecution for extortion under the Hobbs Act. The law is settled that the inducing fear must be a "reasonable" one under all the circumstances presented. *United States* v. *Tolub, supra*, 309 F. 2d 286, 288 (2d Cir. 1962). Petitioner requested such a charge (Nos. 53, 54; 749a-750a), but the Court gave an unduly narrow charge on the subject, to which exception was taken (724a).

The Court nowhere specifically charged that the inducing fear must be a reasonable one. It merely instructed the jury that they could consider petitioner's "official position

in the union and the relationship of that position to operations at Dorn's company" in relation to the problem of congestion in determining whether that was a circumstance which "reasonably generated fear" on Dorn's part (711a). That instruction, however, was certainly an inadequate one. The jury's attention should instead have been focused on all the relevant circumstances bearing on the question of reasonable fear, including such matters as the question whether the problem of congestion was actually caused by the refusal of drivers to back their trucks into the terminal bays, the evidence of the friendly relationship between Dorn and petitioner, and the absence of any threats or demands by petitioner in the post-limitation period. The charge was such as to permit the jury to find that Dorn was motivated by reasonable fear, on the basis of petitioner's official position alone, without regard to all the other circumstances inconsistent with the hypothesis of reasonable fear.

8. Refusal to Submit Issue of Bribery

An important question in Hobbs Act prosecutions is here presented, as to whether a defendant charged with extortion is entitled to an instruction, where there is supporting evidence therefor, that if the challenged payments constituted bribery (29 U.S.C. §186 [a][b]), they could not constitute extortion. The point was argued by counsel (662a, 665a, 668a-669a), and requests so to charge were submitted and denied (Nos. 16, 63, 71; 743a, 751a, 752a-753a, 724a).

There was ample evidence to support the defense that if any crime was committed, it was at most that of bribery. Dorn thus testified that he and petitioner were "friendly" and on a first name basis throughout the period in question and had many a "friendly" drink together, with petitioner picking up most of the checks (304a, 332a); that it was

Dorn who sought petitioner's assistance and at whose request the meetings with petitioner were arranged (238a, 306a-307a, 318a); that petitioner made no threats or demands when Dorn said he would not make any further payments to him (332a-333a); and that Dorn thought he could do better if he were to speak with petitioner and Castellito alone, without Adelizzi, the trucking association representative, being present (316a). It was further disclosed that on at least two occasions prior to his testimony at the instant trial, Dorn invoked the Fifth Amendment after consultation with counsel and upon counsel's advice (311a-312a, 374a-378a). The protection of the Fifth Amendment would manifestly not be necessary for the hapless victim of an extorsive plot.

The New York Court of Appeals has squarely held that the defendant in a prosecution for extortion is entitled to a charge, where there is supporting evidence therefor, that the jury must acquit if they find that bribery as opposed to extortion was committed. *People* v. *Dioguardi*, 8 N.Y. 2d 260, 274 (1960). That holding is in accord with the well settled rule in the Federal courts that a defendant is entitled to a charge upon his theory of defense, and that the failure so to charge is reversible error. *United States* v. *O'Connor*, 237 Fed. 466, 474 (2d Cir. 1956); *Tatum* v. *United States*, 190 F. 2d 612, 617 (D.C. Cir. 1951); *Perez* v. *United States*, 297 F. 2d 12, 15-16 (5th Cir. 1961); *Smith* v. *United States*, 239 F. 2d 935, 939 (6th Cir. 1956).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory Provisions and Rule Involved

18 U.S.C. § 1951

§ 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will; by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all com-

merce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 3282

§ 3282. *Offenses not capital*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 2

§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. *The Grand Jury*

* * * * *

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its

deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,614

UNITED STATES OF AMERICA,

v.

ANTHONY PROVENZANO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 12, 1964

Before BIGGS, *Chief Judge,* and HASTIE and SMITH, *Circuit Judges*

OPINION OF THE COURT
(Filed June 30, 1964)

By BIGGS, *Chief Judge.*

I

Facts

The defendant-appellant, Anthony Provenzano, was indicted on November 15, 1960, in a single-count indictment charging him, an officer of Local 560, International Brother-

hood of Teamsters (Local 560), with obstructing, delaying, and affecting interstate commerce from January 1, 1952 to June 1, 1959, by extorting through economic fear from Dorn's Transportation Company, Inc. (Dorn Company or the Company) or from Walter A. Dorn (Dorn), its Vice President in charge of operations, the sum of $17,100 in violation of 18 U.S.C. § 1951 (the Hobbs Act). The indictment is set out below.[1] Provenzano was convicted and has appealed.

The record discloses the following: On some date prior to January 1, 1952, Dorn Company decided that it would move its trucking terminal from New York City to Secaucus, New Jersey, and did in fac move its terminal there

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[1] The indictment is as follows: "The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

"1. That at all times referred to hereinafter Anthony Provenzano was an officer of Local 560, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, whose principal place of business was located in Hoboken, New Jersey.

"2. That at all times referred to hereinafter Dorn's Transportation, Inc. was a corporation which had its principal office in Rensselaer, New York, which said corporation is hereinafter sometimes referred to as the 'Dorn Company'.

"3. That at all times referred to hereinafter the said 'Dorn Company' was engaged in the business of a common carrier of general commodities in interstate commerce.

"4. That on or about January 1, 1952 the 'Dorn Company' opened a terminal within the State of New Jersey at Secaucus, New Jersey.

"5. That from on or about January 1, 1952 to and including June 1, 1959, within the State and District of New Jersey, Anthony Provenzano did wilfully, knowingly and unlawfully obstruct, delay and affect interstate commerce by extortion, and the said Anthony Provenzano did obtain from the 'Dorn Company' and from Walter A. Dorn, an officer of the 'Dorn Company', and with their consent, the sum of $17,100.00, the payment of said amount having been induced by the said Anthony Provenzano by the wrongful use of fear of financial and economic injury to the business of the aforesaid company in the interstate transportation of general commodities as a common carrier.

"In violation of Title 18, U.S.C., Section 1951."

on January 1, 1952. The Company executed a five-year lease with the owner of the premises at Secaucus at a monthly rental of $1700, paying the rent six months in advance. At some date, after January 1, 1952 but during the time the Company was still under the jurisdiction of New York Teamster Local 707, Provenzano and Anthony Castellito, business agents for Local 560, appeared at the Secaucus terminal and presented a contract with Local 560 bearing Provenzano's signature to the Company's terminal manager for execution. The Company executed this contract on a later date not critical here.

Labor problems seemed to develop almost as soon as the Secaucus terminal was opened. An early problem involved a day switcher, Melchiona, i.e., a yard man employed to connect and disconnect trailers to trucks at the terminal. There is evidence to support the conclusion that Provenzano wanted Melchiona made a full-time day-switcher at the Secaucus terminal. The Company apparently acceded to this desire. Soon thereafter a more serious labor problem arose. The drivers refused to back their trucks into the terminal bays at the Secaucus terminal and to "break" the trailers from the tractors in the bays, assertedly resulting in congestion of the terminal yard. There was testimony that it was the duty of the drivers to back their trucks into the terminal bays and break their units. The period of congestion, according to the Government's witnesses, lasted for from four to nine weeks, occurring in the first six months of 1952, although immediately following the move from New York to New Jersey the Company's business had not increased. The terminal managers testified that it was the refusal of the drivers to back their

trucks into the bays and to break their units that created the congestion. The Company's Vice President of Sales, Hoeting, testified that during this period of congestion: "It wasn't one or two drivers, it was the group . . .", and that this "slowed down the operation." Garcia, a dispatcher and a terminal manager at Secaucus, testified that every driver refused to back his truck into the bays during the period of congestion. Dorn testified that "the operation had become expensive, service suffered, and we had a continual problem."

The record further shows that Dorn in 1952 was Vice President of the Company, that the enterprise was controlled by his brother, and that Dorn himself owned 15% of the stock. Garcia reported to Dorn that the drivers were refusing to back their trucks into the bays. Adelizzi, the general manager of the Empire State Highway Transportation Association, had apparently proved useful in settling the switching dispute referred to previously and for this reason Dorn again brought Adelizzi to New Jersey. Adelizzi testified that the Company had reported it was having difficulty with its men who in some respects "were really sabotaging the job with slowdowns, or refusing to do what they were told." When Adelizzi returned to New Jersey there was a meeting between him, Dorn, Provenzano, Castellito, Melchiona, and Hoeting, in an effort to resolve the Company's troubles. The meeting ended at "loggerheads". There was a second meeting which was no more successful. Castellito and Provenzano had told Dorn that "the men don't have to do this," i.e., back their trucks into the bays and break them, that this was yard work under the New Jersey practice. There followed a

meeting in late April or early May of 1952 between Dorn and Provenzano and Castellito. According to Dorn's statement he told Provenzano and Castellito on this occasion: "This is a situation we can't live with. We have to do something about it." He asked them why the problem could not be straightened out. They replied that Dorn would have to see them in order to adjust it. Dorn asked for time, stating that he had no authority or control over the Company and that he could not make payments. He testified that at this time he "had the understanding that we were talking about the price of a man . . . approximately $100 a week." In May 1952 the three men, Dorn, Provenzano, and Castellito, met again and Dorn testified that he told them that he was willing to do something but that he did not have access to this kind or type of money, i.e., $100 a week. He stated to Castellito and Provenzano in substance that if he could find a way he would be willing to pay. He was asked by counsel for the Government: "And what did you agree to do?" He replied: "The best I could . . . I believe I felt that I had committed myself to the $100 a week if it could be possible."

In the latter part of May or in June 1952, Dorn met Provenzano and Castellito and on this occasion paid between $350 and $400 in cash Provenzano in the men's room of the Swiss Town House, a restaurant. During the next fifteen months Dorn met Provenzano on three more occasions and paid him between $350 and $400 in cash on each occasion. Dorn testified on direct examination as follows: "Q. What was the reason for your agreeing to do whatever Mr. Provenzano and Mr. Castellito asked you?" "A. I felt it was necessary to the operation of our busi-

ness." "Q. What had been the effect on the operation of your business?" "A. The operation had become expensive, service suffered and we had a continual problem." (Objections and rulings of the Court have been omitted from the foregoing quotation.)

Dorn testified that he had been making payments to the extent that he was able to do so and he had not advised the Company of the payments. If Dorn's testimony be believed it will be apparent that by mid-1953 he had been paying Provenzano at the approximate rate of $100 a month, i.e., at approximately $1200 a year, instead of the rate of $5000 a year as apparently had been contemplated.

On some date in the second quarter of 1953, at another meeting, Provenzano informed Dorn that he had a lawyer whom Dorn could put on retainer and gave Dorn a slip of paper bearing the name of Michael Communale. The pertinent conversation on this occasion between Dorn and Provenzano according to the testimony of Dorn on direct examination was as follows: "Q. How did the name Michael Communale come into this luncheon conversation between you and Mr. Provenzano?" "A. Mr. Provenzano mentioned Mr. Communale to me as a lawyer whom I could put on retainer." "Q. Had there been previous discussion with Mr. Communale with respect to placing a lawyer on a retainer—with Mr. Provenzano, rather?" "A. Not that I recall."

The court then asked: "Mr. Dorn, will you tell us what actually took place during the course of this discussion with Mr. Provenzano when the name of Michael Communale was mentioned? Now, tell us what happened." Dorn answered: "We had lunch and Mr. Provenzano mentioned to me that

he had a lawyer. He gave me the name of the lawyer on a slip of paper. I mentioned the fact that in Albany we retained a lawyer at $200 a month. To the best of my recollection there was no specific demand made at that time, nor was there any discussion of the retainer fee." He was asked in respect to a letter of retainer[2] that he wrote Communale much later: "With respect to the substance of the letter, where did you get that information?" He replied: "Anthony Provenzano." Dorn testified in respect to the retaining of Communale that "it was the method of making the payment that I had committed myself to make at the second meeting in 1952." Dorn admitted that he had never met Communale. Compare the statement contained in the final paragraph of the retainer letter.

We deem further quotations from Dorn's testimony in respect to the engagement of Communale as unnecessary in this opinion.

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[2] The letter, which is in evidence as Government's Exhibit 69, is as follows:

"Dorn's Transportation Inc.
"Rensselaer, New York
"August 10, 1953

"Mr. Michael G. Communale
591 Summit Avenue
Jersey City, New Jersey

"Dear Mr. Communale:

"We would like to have you accept a retainer from our company, in order for you to handle our legal matters regarding the ton mile tax, and other legal matters that arise in the New York City area, starting at once.

"We are sorry for the delay in writing this letter which we agreed to do when we originally discussed this matter.

"Very truly yours,

/s/ Walter A. Dorn
W. A. Dorn
Vice-President"

"WAD/vms"

The evidence shows that commencing on June 1, 1953, Dorn Company sent to Communale a check in the amount of $200 on or about the first of each month, every month until June 1, 1959, that the checks sent in September, October, November, December, 1953, and in January, 1954 were in the amount of $400 each. An examination of the evidence discloses only one mention of $200 as the amount of a monthly retainer in any conversation between Dorn and Provenzano.[3] The record also demonstrates that of the 73 checks sent by Dorn Company to Communale some were deposited in trust accounts and the rest were cashed. It will be noted that Dorn did not send the retainer letter (Government Exhibit No. 69) until August 10, 1953, and that it referred to an earlier conversation which the evidence seems to demonstrate never took place. The payments to Communale were carried on the books of Dorn Company as legal expenses.

The record also shows that on April 5, 1957, Dorn wrote Communale stating that he wished to cease retaining him as of May 1, 1957 and to employ him on an individual case basis thereafter. This letter is in evidence as Government's Exhibit No. 27.[4] The evidence is clear, however, that the payments by Dorn Company to Communale continued de-

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[3] See Dorn's statement quoted in this opinion *supra*, viz., "I mentioned the fact that in Albany we retained a lawyer at $200 a month."

[4] The letter, dated April 5, 1957, is as follows: "Mr. Michael G. Communale, Attorney-at-law, 591 Summit Avenue, Jersey City, New Jersey.

"Referring to your letter of February 28, 1957, I would like to advise you that it is our wish to drop our retaining status as of May 1, 1957. Please indicate to me if it would be agreeable to continue to represent us in that area on individual cases.

"Very truly yours, Dorn Transportation, Inc.

Handwritten by the witness, "Walter A. Dorn.

Typewritten, "Walter A. Dorn, President.

"WAD/JMA."

spite the letter terminating Communale's retainer until June 1, 1959, and that until that day the monthly payments were made in the usual manner.

The evidence also demonstrates that Communale was Assistant Prosecutor of Hudson County, New Jersey, from 1952 to 1959; that while he was Assistant Prosecutor he maintained a private law office in Jersey City, New Jersey; that throughout the period during which he allegedly represented Dorn Company he never met Dorn; that he never spoke with anyone from Dorn Company; and that his communications with Dorn Company were limited to approximately half a dozen letters, which with the exceptions of the two set out in notes 2 and 4 of this opinion are without real significance and dealt with very minor matters.

The record further shows that during the entire period in which payments were made, the first and only labor grievance between Dorn Company and Local 560 occurred in January, 1959, but that in the period 1960 through 1962 eight labor grievances arose.

As was said by the Supreme Court in Glasser v. United States, 315 U.S. 60, 80 (1942): "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." For this reason we have found it unnecessary to recite here the evidence produced by Provenzano on his own behalf.

II

Issues of Law

(A) The Hobbs Act, 18 U.S.C. § 1951, in relevant part, provides as follows: "*Interference with commerce by*

threats or violence (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section . . . (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside therof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Preliminarily it should be pointed out that Provenzano, under the charge of the court, could not be convicted of an offense committed prior to November 15, 1955. In this respect the court charged: "[T]he defendant in this case may not be convicted of any offense charged by this indictment unless the offense was committed during the period of time between November 15, 1955 and June 1, 1959." The applicable statute of limitations is in Section 3282, Title 18, U.S.C., and provides that no person shall be prosecuted for any offense, not capital, unless the indictment is found within five years next after the offense

was committed. The court below, as we have indicated, correctly considered November 15, 1955 as the beginning of the five-year period preceding the handing down of the indictment on November 15, 1960. The payments made by Dorn to Provenzano and those made by Dorn Company to Communale were treated by the court below, under the theory advanced by the prosecution, as a continuous series of payments made as a result of the fears instilled in Dorn by Provenzano and Castellito in 1952 and 1953 which continued until June 1, 1959, when the last payment was made by the Company to Communale. In other words the "unit of prosecution" asserted by the Government was based on a single continuous plan of extortion the execution of which commenced in 1952 and which continued until June 1, 1959 when the last payment was made to Communale. The Hobbs Act, the Government asserts, defines the applicable unit of prosecution as the restraint upon commerce and not the causes of the restraint, citing Stirone v. United States, 361 U.S. 212, 215 (1960). Provenzano seems to contend that each separate payment made by Dorn or by Dorn Company should have been alleged as completing a separate offense which should have been set up as an individual count in a multi-count indictment, each count requiring proof by the Government of every element of the Hobbs Act offense, including the instilling of fear of economic harm and the payment of money because of that fear. This position, if adhered to by this court or by the court below, would have rendered the indictment in the instant case inoperative and would have entitled Provenzano to a judgment of acquittal.

We cannot agree with Provenzano's argument. The evidence and the inferences to be drawn therefrom will sustain the conclusion hereinbefore set out as advanced by the Government that Provenzano and Castellito put Dorn in fear in 1952 and 1953 and caused him and Dorn Company to make the payments to Provenzano and to Communale, the latter continuing until June 1, 1959. The payments were the consummation of the extortionate scheme which was a single and unified one. No pertinent issue as to limitation of the action is presented for the payments were carried well into the post limitation period. See United States v. Dierker, 164 F. Supp. 304, 305 (W.D. Pa. 1958). As we have said, the Hobbs Act strikes at the burden on commerce, the extortionate payments which Dorn Company was compelled to bear. It was not necessary to decide whether the payments by Dorn as distinguished from those made by Dorn Company placed a burden on commerce for an examination of the court's charge on this phase of the case demonstrates its adequacy and fairness. The court charged the jury clearly that the payments relied on by the Government as extortive in support of the Hobbs Act charges were those made by Dorn Company to Communale.

(B) An attack is made by Provenzano to the effect that there is no proof whatsoever in the record that he received any benefit, pecuniary or otherwise, direct or indirect, from the payments made by Dorn Company to Communale. Both the Government and Provenzano rely in large part upon the decision of the Supreme Court in United States v. Green, 350 U.S. 415 (1956). In United States v. Green, 135 F. Supp. 162, 164 (S.D. Ill. 1955), the trial court held,

granting a motion in arrest of judgment, that there was no "attempt to extort for the use of either the Union or the Defendant Green, any money or property of the contractor." The Supreme Court reversed the order in arrest of judgment, Mr. Justice Reed in interpreting the position of the District Court stated: "From its view that extortion as defined in the Hobbs Act covers only the taking of property from another for the extortioner's personal advantage, the necessity to arrest the judgment followed. . . . We do not agree with that interpretation of the section. The Hobbs Act was passed after this Court had construed § 2 of the Federal Anti-Racketeering Act of 1934, 48 Stat. 979, in *United States* v. *Local 807*, 315 U.S. 521. Subsection (a) of § 2 barred, with respect to interstate commerce, exaction of valuable considerations by force, violence or coercion, 'not including, however, the payment of wages by a bona-fide employer to a bona-fide employee.' We held in *Local 807* that this exception covered members of a city truck drivers' union offering superfluous services to drive arriving trucks to their city destination with intent, if the truck owners refused their offer, to exact the wages by violence. In the Hobbs Act, 60 Stat. 420, carried forward as 18 U.S.C. § 1951, which amended the Anti-Racketeering Act, the exclusion clause involved in the *Local 807* decision was dropped. The legislative history makes clear that the new Act was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship. The words were defined to avoid any misunderstanding.

"Title II of the Hobbs Act provides that the provisions of the Act shall not affect the Clayton Act, §§ 6 and 20, 38 Stat. 731, 738; the Norris-LaGuardia Act, 47 Stat. 70; the Railway Labor Act, 44 Stat. 577; or the National Labor Relations Act, 49 Stat. 449. There is nothing in any of those Acts, however, that indicates any protection for unions or their officials in attempts to get personal property through threats of force or violence. Those are not legitimate means for improving labor conditions. If the trial court intended by its references to the Norris-LaGuardia and Wagner Acts to indicate any such labor exception, which we doubt, it was in error. Apparently what the court meant is more clearly expressed by its statement . . . that the charged acts would be criminal only if they were used to obtain property for the personal benefit of the union or its agent, in this case Green. This latter holding is also erroneous. The city truckers in the *Local 807* case similarly were trying by force to get jobs and pay from the out-of-state truckers by threats and violence. The Hobbs Act was meant to stop just such conduct. And extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property."

Provenzano argues that the Supreme Court did not say that a conviction could be sustained where there is no proof of any benefit whatever and insists that the Court was careful to say that no "direct" benefit was necessary and that this implies that at the very least an "indirect" benefit must be conferred. He goes on to argue that the Hobbs Act had its origin in the common-law crime of extortion as incorporated in the laws of New York and with this statement we have no disagreement. We so held in United States v.

Nedley, 255 F.2d 350 (1958) but we did not decide in the cited case the issue here presented as to whether or not it was necessary to show that the extortioner acted for his own benefit directly or indirectly. Moreover, the law of New York, if it be relied on, does not support Provenzano's position. Insofar as we are able to ascertain there is no statutory or common law of New York requiring that the extortioner benefit. The gravamen of the offense is loss to the victim. In People v. Fichtner, 281 App. Div. 159, 118 N.Y.S. 2d 392 (1952), the defendants, clerks in a grocery store, extorted $25 from a customer, Smith, by threatening prosecution for shoplifting. In the cited case the court stated at p. 394: "It is not disputed that the $25 taken from Smith was 'rung up' on the store register; that the money went into the company funds and that defendants received no part of the money." The court went on to say: "Nor is defendants' good faith in thus enforcing payment of the money alleged to be due to their employer a defense." *Id.* at 396. The decision was unanimously affirmed by the Court of Appeals of New York, 305 N.Y. 864, 114 N.E. 2d 212 (1953).

In People v. Scheppa, 295 N.Y. 359, 67 N.E. 2d 581 (1946), rehearing denied, 296 N.Y. 855, 72 N.E. 2d 34 (1947), the Court of Appeals of New York, without dissent, affirmed Scheppa's conviction for extortion. The jury had acquitted Calabria, Scheppa's co-defendant. The Court of Appeals of New York in reviewing the facts stated: "The money was later actually paid to Calabria, to be turned over to appellant, and there is no proof that Calabria did turn it over. But there was testimony from which the jury could find that Calabria was acting not as an agent for, or col-

laborator with, appellant, but as a friend of complainant, believing, however mistakenly, that discretion in compliance would serve complainant better than valor in resistance." 295 N.Y. at 361, 67 N.E. 2d at 582.

As to the appellant's contention that there is no showing of benefit to anyone in the case at bar, it is apparent that the contention begs the question. Communale received substantial sums of money. It is not shown that he received them for Provenzano's benefit. But there is ample evidence from which the jury could infer that the so-called "retainer" was a mere fiction, a fraud, a palpable cover-up device for successful extortion. This issue was resolved by the jury against Provenzano and there is no basis upon which this court should or could reach a contrary conclusion.

In view of the foregoing authorities we hold that it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof. It is enough that payments were made at the extortioner's direction to a person named by him.

(C) Provenzano asserts that there is insufficient evidence to prove beyond a reasonable doubt that the payments made by Dorn were made under compulsion induced by reasonable fear. He asserts that the law is "rather well settled" that the fear which impels the surrender of property must be a "reasonable" one under all the circumstances, citing United States v. Tolub, 309 F.2d 286, 288 (2 Cir. 1962). The rule adopted in Tolub is a fair one but what the appellant does on this point of his appeal is what he does under many other points, viz., quarrel with the evidence and with the jury's conclusions in respect thereto. There is ample

evidence to sustain the conclusion that Provenzano, as the business agent for Local 560, held himself out to be in a position to slow down Dorn Company's business and did in fact do so. Dorn's fears in this respect were not unreasonable but were reasonable. The continuation of the conduct of the truckers at the Secaucus terminal could have reduced Dorn Company to relative impotency.

But Provenzano makes a further point. He asserts that it is necessary that the Government prove by additional or supplemental proof that Dorn's fears, even assuming them to be reasonable, instilled in him in the period barred by the statute of limitations, were reinstilled in him during the period not barred by acts committed within the latter period, or at least that Dorn's fears originating in the pre-limitation period were retained by him in the period not barred by the statute. In our view this argument overstates the applicable test. If Dorn's payments of money to Provenzano in the pre-limitation period were reasonably impelled by fear, the jury was entitled to infer that the payments made by Dorn Company to Communale within the period not barred by the statute of limitations were also and similarly impelled by Dorn's fears and that Provenzano thereby imposed a burden on Dorn Company and interstate commerce.

It must be conceded, however, that Provenzano's counsel here makes an ingenious and original argument. It is as follows: The payments to Communale made by Dorn Company were made monthly without the interposition of a signature by an officer of Dorn Company and by the use of a machine called a "Checkwriter". Dorn Company's bookkeeper and accountant, Lindquist, testified that where either

weekly or monthly charges of "less than a thousand dollars a month were involved," such as those with which we are concerned in the case at bar, "instructions were given to a disbursement clerk which became [an] automatic procedure of issuance" and that the "checks were typed out" and that then "they go through a checkwriter". The checks, Lindquist testified, were put into the checkwriting machine "which signs the authorized signatures". But the fact remains that someone, perhaps Dorn, ordered Communale's name put on the necessary list and that it continued on that list until Dorn or some other person ordered it taken off sometime in the first half of the year 1959. Provenzano's argument seems to imply that a checkwriting machine has an animus of its own. We cannot accept this argument, ingenious as it is. It implies that Dorn was unaware of the fact that Dorn Company had assumed the obligation which he had undertaken in the first instance. This issue was one for resolution by the jury and the jury must be assumed to have found against Provenzano in respect to it. The facts respecting the payments made by Dorn and Dorn Company were fully before the jury. The triers of the fact were entitled to draw their own conclusions as to why the payments made to Communale were made and continued to be made. There was no error here.

(D) There is one point which arises in respect to the payments made by Dorn to Provenzano and by Dorn Company to Communale which requires extended consideration. Dorn on cross-examination in respect to his dealings with Provenzano, was asked in substance whether or not it was true that Provenzano never made any demand for money

for himself personally or any request for any money. Dorn answered "No" to this question. Dorn was then asked, "Did he [Provenzano] ask you for a gift?" Dorn replied, "No". He was then asked, "Gift of anything?", and he again replied, "No.". He was finally asked the following question: "So that any arrangement that you had to pay him [Provenzano] money ended when you said you wouldn't pay it any more in 1954,[5] isn't that right?" Counsel for the United States objected. The objection was sustained and Provenzano's counsel thereupon took an exception.

No ground for the objection was stated by counsel and the court below did not divulge the basis of its ruling. It must be borne in mind that extensive evidence was put into the record by the United States about Dorn's payments to Provenzano in the pre-limitation period and Dorn Company's payments to Communale in the post-limitation period. Provenzano's counsel objected strenuously and unsuccessfully to much of the evidence which was presented to the jury. We are of the opinion that the trial court did not err in admitting it. It was the theory of the Government that the payments made by Dorn Company to Communale were merely a continuation under another guise but for the same purpose, i.e., to secure industrial peace at the Secaucus terminal, as were the payments made by Dorn to Provenzano himself. If Provenzano could break this continuum by showing that it was terminated prior to the time payments began to be made by Dorn Company to Commu-

[5] As will appear from an examination of the record, Dorn testified that on some occasion late in 1953 or early in 1954 he told Provenzano that he, Dorn, could no longer make the payments to Provenzano. Compare the date of the retainer letter in note 2 *supra*.

nale it would have been necessary for the United States to prove that Provenzano had instilled fear into Dorn Company which had caused that Company to make the payments to Communale.[6] In such an event, the Government's theory of a continuum of fear beginning in 1952 and terminating in June 1959 would have been impaired. Provenzano would have been able to argue, if Dorn had stated that the "arrangement" had been terminated, that there was no showing of any threat or demand in the post-limitation period.

Our inquiry then must be whether the question was a proper one. The "arrangement" referred to by Provenzano's counsel was really a contract, however illegal and contrary to public policy it may have been. In substance it was an agreement entered into by Dorn with Provenzano, seemingly in conjunction with Castellito, that in consideration of the payments to be made, the labor troubles that were impeding the Company's business, interstate in nature, would cease. What Provenzano's counsel was calling for in his question which was objected to was an opinion by Dorn, a layman, as to whether or not a contract had been brought to an end. The question therefore called for a legal conclusion which lay within the province of the court. It follows that the question was an improper one and the court below did not commit error in refusing to permit Dorn to answer it.[7]

What we have said indicates, we think, that Provenzano had the right on cross-examination of the Government's witnesses or by testimony offered on his own behalf, to inquire

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[6] See the discussion under heading "C" *supra*.

[7] We need not discuss the point that the question was also vague and argumentative and as such improper.

into all pertinent circumstances relating to his transactions with Dorn or Dorn Company or with anyone connected with them. The particular question in issue here, could itself have been asked a second time in a less conclusionary and ambiguous fashion. We note, however, that Provenzano's counsel did not attempt to do so, apparently considering further inquiry on the point not worthwhile. We are of the opinion that he was permitted to ask the witness all proper questions without intervention by the trial judge. The relevant facts relating to the circumstances respecting Dorn's payment to Provenzano and Dorn Company's payment to Communale were brought out. Provenzano's counsel had every opportunity to avail himself of the benefits of proper cross-examination and to the extent he deemed it desirable, did in fact do so. We perceive no error here.

(E) The court below, without any request by the Government insofar as we can ascertain from the record, gave an instruction to the jury that Provenzano might be found guilty of aiding and abetting the commission of the crime charged in the indictment. The court first read the substance of the provisions of 18 U.S.C. § 2, with certain immaterial omissions, to the jury, stating as follows: "Whoever commits an offense against the United States or aids, abets or procures its commission is punishable as a principal. Whoever wilfully causes an act to be done which if directly performed by him would be an offense against the United States is punishable as a principal." The trial judge went on to say: "The guilt of a defendant may be established without proof that he personally did every act constituting the offense charged. Any person who par-

ticipates in the commission of an offense with knowledge of its commission is a principal and subject to prosecution. This rule, however, does not apply to one who without knowledge of the commission of an offense innocently or inadvertently aids or assists in its perpetration. This rule may become particularly significant here depending of course on the view of the testimony and the documentary evidence. In order to aid and abet another to commit a crime it is necessary for the defendant wilfully to associate himself in some way with the criminal venture and that he wilfully participate in it as in something he wishes to bring about, and that he willfully seek by some action of his to make it succeed. One who aids and abets, counsels, commands, induces or procures the commission of an act is as responsible for that act as if he committed it directly. In order to aid and abet another to commit a crime it is necessary, as I indicate., that the defendant in some way associate himself with the venture."

At the close of the charge Provenzano's counsel objected *inter alia* to that portion of it which dealt with aiding and abetting. Provenzano's counsel stated: "I except to so much of your Honor's charge—something that was not in the indictment, not mentioned—and that was this, that portion of your charge with regard to aiding and abetting wherein your Honor said that guilt may be established without direct proof of knowledge of the crime on the defendant, in connection with this aiding and abetting, and I except specifically to your Honor's statement to the jury that—according to your Honor's description of aiding and abetting you said that all that was required was—and here

I think I have the exact words—'that the defendant associate himself in some way' with the crime. Certainly it would not be the law with regard to this question of aiding and abetting, and I respectfully except to your Honor's charge particularly on the question of intent and the meaning of it and what people reasonably consider the function and end results of their acts as being limited solely to the defendant Provenzano and not including Dorn or any of the other witnesses in the case, and I particularly except to your Honor's statement that fear of injury, financial injury—"

Later Provenzano's co-counsel made a further and a different objection, stating: "Just one observation, it is my opinion, your Honor—I know Mr. Singer [Provenzano's chief counsel] has objected to your Honor's charge on the theory of aider and abettor. It is my opinion he could not aid somebody who was not charged as a principal, and I see no mention as to Communale being charged as a principal or anyone else, so no one can aid and abet someone who is not [so] charged."

After a side bar conference the court then said to the jury: "Ladies and gentlemen of the jury, while I think I have covered this, I am going to repeat again to you instructions with reference to the offense of aiding and abetting. One who aids and abets, counsels, commands, induces or procures the commission of an act is as responsible for that act as if he committed it directly. In order to aid and abet another to commit a crime it is necessary to show that a defendant in some way associated himself with the venture, that he participated in it as something

what [sic] he wishes to bring about, that he seeks by his action to make it succeed."

The jury then retired to consider its verdict and after the retirement of the jury Provenzano's co-counsel stated: "I want the record to reflect that we object to your Honor again charging on aiding and abetting, that is in the light of the fact that your Honor didn't change it to any extent."

The Court replied: "Mr. Singer mentioned that I stopped when I merely related that he must be associated with a criminal venture. I felt that Mr. Singer was in error, but in view of the fact that he raised the question I thought in the interests of further precaution that I would accept what he told me and I charged accordingly, but your exception—your further exception is noted upon the record."

On this appeal Provenzano urges that the court erred in submitting to the jury the instruction on aiding and abetting. The sole ground relied upon for this contention is in his words "that there was no proof whatever that Communale was a principal in the crime or that there was any collaboration between Communale and defendant." At the trial and before the case was submitted to the jury, Provenzano's counsel directed the court's attention to approximately one hundred alleged defects in the charge. A careful scrutiny of the exceptions relating to the aiding and abetting instruction which are set out in the immediately preceding paragraphs, makes evident that the particular ground of objection urged here was not brought to the attention of the court.

It is of course fundamental that as a general rule the failure to object to an instruction during a criminal prose-

cution on the ground urged on appeal, forecloses the party from raising the question before the reviewing court. See, e.g., Johnson v. United States, 291 F.2d 150 (8 Cir.), certiorari denied, 368 U.S. 880 (1961). Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." The manifest purpose of the rule is to avoid whenever possible the necessity of a time-consuming new trial by providing the trial judge with an opportunity to correct any mistakes in the charge. See Palmer v. United States, 229 F.2d 861 (10 Cir.), certiorari denied, 350 U.S. 996 (1956).

By virtue of general law and Rule 52(b) of the Federal Rules of Criminal Procedure,[8] this court has the power to consider sua sponte errors affecting substantial rights in cases where no objection was taken. Our discretionary power in this regard must be viewed in light of Rule 30 and in no event can be exercised except in situations where the error is such as to involve a manifest miscarriage of justice. See United States v. Vasen, 222 F.2d 3 (7 Cir.), certiorari denied, 350 U.S. 834 (1955). Conceding that it may have been unnecessary for the court to charge that Provenzano might be convicted as an aider and abettor within the meaning of Section 2, 18

[8] Rule 52(b) provides: "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

U.S.C., we conclude that any error in this regard with respect to Provenzano's relationship to Communale, was neither plain nor affected substantial rights within the purview of Rule 52(b). See and compare United States v. Lurie, 222 F.2d 11, 16 (7 Cir.), certiorari denied, 350 U.S. 835 (1955).

The general rule is that in order to convict a defendant of aiding and abetting the commission of a substantive offense, the proof must establish that the crime in question was committed by someone and that the person charged as an aider and abettor, aided and abetted in its commission. Von Patzoll v. United States, 163 F.2d 216 (10 Cir.), certiorari denied, 332 U.S. 809 (1947). It is not prerequisite to the conviction of the aider and abettor that the principal be tried and convicted or in fact even be identified. See Gray v. United States, 260 F.2d 483 (D.C. Cir. 1958). Each participant in an illegal venture is required to "stand on his own two feet." United States v. Klass, 166 F.2d 373, 380 (3 Cir. 1948). An individual may be indicted for commission of a substantive crime and convicted by proof showing him to be an aider and abettor. See United States v. J. R. Watkins Co., 127 F. Supp. 97, 101 (D. Minn. 1954). See also United States v. Washington, 287 F.2d 819 (7 Cir.), certiorari denied, 366 U.S. 969 (1961); United States v. Krepper, 159 F.2d 958, 970-71 (3 Cir. 1946), certiorari denied, 330 U.S. 824 (1947).

The offense contemplated by Section 1951, 18 U.S.C., in question here, is composed of multiple elements, e.g., demand, imposition of fear, and payment and interference with commerce. Where more than one actor is involved in an alleged violation of this section, all contributing in vary-

ing degrees to the success of the operation,[9] the distinction between principal actors and aiders and abettors in the enterprise is somewhat illusory.[10] The present case typifies just such a situation. Counsel for Provenzano made no request for a more detailed charge on aiding and abetting and without such a request, the court was not obligated to

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[9] The Hobbs Act prior to the present revision contained its own aiding and abetting provision. 60 Stat. 420 (1946) provided as follows: "SEC. 1. As used in this title— . . . (c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

"SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both."

The reviser's notes to Section 1951, 18 U.S.C., states: "The words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words 'participates in an attempt' and the words 'or acts in concert with another or with others', in view of section 2 of this title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself."

[10] It was perhaps for this reason that the Hobbs Act prior to the present revision made specific provision for aiders and abettors. See note 9 *supra*. No distinction is of course drawn under either version of the statute with respect to punishment of principal actors and aiders and abettors.

instruct the jury further on the point.[11] See Guon v. United States, 285 F.2d 140, 142 (8 Cir. 1960).

In the instant case the evidence established Provenzano's essential participation in a scheme to mulct Dorn Company. There was sufficient evidence to connect Communale as well as Castellito with Provenzano in a violation of section 1951. Compare Nye & Nissen v. United States, 336 U.S. 613, 619-20 (1949). We need not reiterate the relevant testimony which is set out in some detail under heading "I" of this opinion. The jury was entitled to draw any reasonable inference from the evidence in favor of the United States and against Provenzano. It is sufficient to state that the evidence indicated that Castellito participated in the imposition of the original demand commencing the extortion, and it was a reasonable inference that Castellito was also implicated with respect to the initiation of the payments to Communale. The evidence demonstrated that Communale participated in the collection of payments consummating the extortionate scheme. The jury could have found that Provenzano aided and abetted either or both Communale and Castellito in a collaboration during which each performed some essential act. Compare Meredith v. United States, 238 F.2d 535, 541-42 (4 Cir. 1956).

In view of the foregoing it is difficult to see how Provenzano could have suffered any prejudice whatever with re-

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[11] In Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), the Supreme Court said, quoting Judge Learned Hand in United States v. Peoni, 100 F. 2d 401, 402 (2 Cir. 1938): "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" The court's charge was in almost literal compliance with this test.

spect to the objection to the aiding and abetting charge raised on this appeal. In any event in our view it is clear that the question is not one which even remotely suggests the possibility of a miscarriage of justice.

(F) The position of Provenzano in respect to what must be shown to prove him guilty and what he asserts was demonstrated by the proof is far from clear. Provenzano seems to insist that there was no proof that his acts constituted any interference with interstate commerce. The court charged in part on this aspect of the case as follows: "The inducement by fear of payment of money out of the funds of a business for unnecessary, fictitious services, constitutes extortion as defined by the statute, even though . . . the one who caused such payments of money to be made did not directly or indirectly receive any part of the money which was paid.

"If you find from the evidence that money was obtained from Dorn's Transportation, Inc., by way of extortion during the period from November 15, 1955 to and including June 1, 1959, at the instance of the defendant you may infer from that fact that payments of money made did in some way or degree obstruct or delay or affect the business in which Dorn's Transportation, Inc., was engaged. Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired. The specific amount of such money obtained by extortion or the precise manner or degree to which it had an effect on the business is of no consequence. It is merely required by the law where extor-

tion is shown that it did in some way or degree obstruct, delay or affect commerce. The pertinent language of the statute which I will now repeat here again is as follows: 'Whoever, in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by extortion shall be punished' in the manner prescribed by the statute."

At a later point the court charged the jury on this point in pertinent part as follows: "As I stated to you earlier in my charge, you may infer if extortion is established that it did in some way or degree obstruct or delay or affect commerce, and in connection with this it is not necessary for you to find from any of the evidence submitted with respect to the congestion that any particular shipment of freight moving in or out of the Secaucus yards was obstructed or delayed. It is the depletion of the resources of a business by extortion which permits as a reasonable inference if the extortion is established that its operations are delayed, obstructed, affected. 'Affected' as used in the statute is spelled a-f-f-e-c-t-e-d."

The substance of Provenzano's objection was that the mere payment of money, asserted by him to be but one of the elements of extortion, composed of threats of violence, fear and payment, could not, as the court in this case charged, constitute a sufficient interference with commerce to come within the purview of the Hobbs Act. But in Stirone v. United States, 361 U.S. 212, 215 (1960), the Supreme Court respecting the intent of Congress in passing the Hobbs Act, stated: "That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate com-

merce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.' 18 U.S.C. § 1951(a). Had Rider's business been hindered or destroyed, interstate movements of sand to him would have slackened or stopped. The trial jury was entitled to find that commerce was saved from such a blockage by Rider's compliance with Stirone's coercive and illegal demands. It was to free commerce from such destructive burdens that the Hobbs Act was passed. United States v. Green, 350 U.S. 415, 420." There are two basic elements in a Hobbs Act crime: interference with interstate commerce and extortion. Both were set out in the indictment and both were proved in the case at bar. We can perceive no reason why extortive payments, in substantial amounts, paid as here from the treasury of a company engaged in interstate commerce in order to avoid obstruction of the company's interstate business should not be deemed to affect commerce and therefore to lie within the proscription of the Hobbs Act. Compare Bianchi v. United States, 219 F.2d 182, 189-191 (8 Cir. 1955), certiorari denied, 349 U.S. 915 (1955). This was the substance of the court's charge. We hold it to have been a correct one in the light of all the circumstances.

(G) The next issue which we must discuss requires its own statement of facts. The case was finally moved for trial on Thursday, May 23, 1963.[12] On that day the Government asked that the jury be sequestered in order to protect the "integrity" of the case and the position of the defendant whose "misguided" friends "may seek to

[12] The circumstances of the delays are not relevant here.

do things in the course of a trial which would only be to his detriment, but over which he would have no control". The court reserved decision on the motion. A jury was empaneled and was sworn immediately thereafter. The trial started on May 23, 1963 with arguments on certain motions and with the Government's opening statement. No testimony was taken on that day. The trial was scheduled to continue on Friday, May 24, 1963, and did in fact do so, although under somewhat extraordinary circumstances. It appears that on that morning at some hour not shown in the record, Walter Glockner, the shop steward of Dorn Company, a member of Local 560 and a "potential witness" for the United States, was shot to death in front of his home. There is nothing in the record which tends to show accurately the hour of the shooting.[13] But it appears that on Friday, May 24, after hearing one witness, Lindquist, the office manager and assistant secretary of Dorn Company, at about 12:15 P.M., the court excused the jury until 2 P.M., saying that at that time "[W]e will return and we will continue on this case. The marshal will give you further instructions with respect to the recess, but you are to return here at 2 P.M." The jurors were not permitted to leave the courthouse for lunch and were cut off from outside sources of information during the recess.

At side bar at the beginning of the afternoon session, on Friday, May 24, Assistant United States Attorney Boylan stated to the court: "As I indicated earlier there

[13] The Government states in its brief that Glockner was shot between 6 and 6:30 A.M. on May 24, 1963, and Provenzano's brief makes a similar statement. We have stated repeatedly that we cannot accept statements made in briefs as evidence.

was an incident this morning in which Mr. Walter Glockner, a shop steward at Dorn Transportation terminal and a member of Local 560, was shot."[14] Mr. Boylan went on to say: "[W]e have been besieged by the press with respect to Mr. Glockner's participation, if any, in this trial . . . We have declined to give any comment at all." He said that if Provenzano was to be given a fair trial the jury had to be insulated from "any version whatever" of the shooting and that the members of the jury should be "locked up". The court then called upon Provenzano's principal attorney, Mr. Singer, who told the court that he did not see "how anybody could insulate the jurors from any situation like that. It is a practical and physical impossibility even if you locked them in the jury room in this courthouse." He went on to say: "No great harm would come to anyone if I moved for a mistrial and you consented, because as you said, we couldn't get a fair trial in this atmosphere and we delayed it [the trial] until fall." There was further colloquy which need not be set out here and the court received and read a newspaper account of the shooting. The trial judge then said: "I have given further consideration to the Government's motion to sequester this jury and I have to consider all of the circumstances in connection with that as it may relate to a trial, a fair trial in this case by the jury. I have reached the conclusion that the jurors should be sequestered. In fact the jury has been at the order of the Court sequestered since our last recess. They have had lunch in the jury room. They will be seques-

[14] A search of the record does not indicate when or how Mr. Boylan gave the "earlier" indication respecting Glockner's shooting.

tered for the remainder of this trial and the trial will now continue on every weekday and holiday with the exception of Sunday until it is concluded . . . I now instruct the marshal to arrange for accommodations for the jurors, to advise them of the order of sequestration and to obtain from them a list of the things that they need and to bring those things from their homes to Newark. . . ."

Mr. Singer then moved for a mistrial on the ground that the court's action in sequestering the jury under the circumstances indicated was so prejudicial as to deprive the defendant of all possibility of a fair trial. He stated: "I point out . . . that at this point we don't know whether the jurors ever heard of this particular incident before they arrived at the courthouse this morning. I have no knowledge when the incident occurred and I think that under these circumstances your Honor's sequestration of the jury would in essence be ascribing to this defendant some responsibility for this act which is the cause of the discussion, and I think it would be unfair and unjust under these circumstances to compel him to further continue on trial."

The court then denied Provenzano's motion for a mistrial. The jury was called back into court and was informed by the court that arrangements were being completed for sequestration and the jury was excused with the instruction that its members should return at 10 a.m. the following morning.

Upon the morning of the following day, Saturday, May 25, 1963, immediately upon the convening of court, the jury being absent, Provenzano's chief counsel, Mr. Singer,

apparently presented motions relating to the sequestration of the jury.[15] The court informed him that it would rule

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[15] We use the word "apparently" advisedly for the "motions" which the typewritten transcript indicates were handed up to the court on the morning of Saturday, May 25, as a separate document or documents, are not shown among the docketed papers as having been received at this time. It does appear, however, as is set out at a later point in this opinion, that the motions were received and docketed on July 12, 1963, at 2:25 P.M., some days after the jury had rendered its verdict, had been discharged, and Provenzano had been sentenced. The motions are entitled "Defendant's Additional Requests to Charge" and are set out in the appellant's appendix. They are as follows:

(Title Omitted)

"Without Waiver of Prior Motions for a Mistrial Made Because of the Court's Order to Sequester the Jury, It is Respectfully Requested that the Court Charge the Jury as Follows:

"1. That the fact that the jury is being held together and not permitted to go home during this trial is not because of any act or statement of Mr. Provenzano or his attorneys.

"2. That the act of holding the jury together should not in any way cause a juror to give this cause any special treatment or importance, this case is to be tried and judged just as all other cases are judged.

"3. During the sequestration of the jury, no juror shall be permitted to listen to any radio or television broadcast and that access to a radio or television set is barred to them.

"4. No juror is permitted to read any newspaper or magazine or news publication of any kind. (Explanation) This last request is made because the removal of portion of a newspaper or magazine which has any items involving this case creates suspicion and engenders prejudice.

"5. The jury is informed that the application to sequester them was made by the Government and was granted by the Court over the opposition of the defendant.

"Motion for Mistrial on the Ground of Prejudice

"It now appears quite affirmatively that speculation is rife that the attack on or shooting of the individual mentioned by the Asst. United States Attorney in the side bar discussion has been attributed to the defendant, Anthony Provenzano. Radio and television broadcasts, as well as newspaper articles blazon forth—with a constant stream of prejudicial matter charging responsibility for this shooting to Anthony Provenzano. It is impossible, no matter how the jury be sequestered,

upon these motions later in the day and the hearing of witnesses was proceeded with, of course in the presence of the jury. We find no place in the transcript of the proceedings at the trial where the court ruled expressly on these three written motions of May 25, 1963 or at any time thereafter, though portions of them were made orally subsequently and the motion for a separate examination of the jurors was included as a ground in Provenzano's written motion for arrest of judgment and for a new trial. All portions of the motions made orally were denied. We find no place in the transcript where the three written

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Footnote 15—continued:

to keep from the jurors this openly broadcast and widely spread matter.

"Under these circumstances, the defendant respectfully moves for the declaration of a mistrial, and after such mistrial for a reasonable adjournment of the trial of the matters under this indictment until such time as the publicity attendant to this very incident shall have died down.

"This motion is made in written form in order to avoid the possibility that the ground of the application become available to the newspapers or other news media.

"Motion to Have Court Make Private Inquiry of Each Juror.

"At this time the defendant, Anthony Provenzano, respectfully asks that each juror be separately questioned in a private place away from the other jurors; that such questioning be done by the Court in the presence of the United States Attorney and the Attorneys for the defendant; the Court is requested to ask each juror whether (a) he has heard, seen or read anything about the Teamsters' Union, Mr. Provenzano or the Dorn Transportation Co., or any of its employees since the commencement of the trial.

"(b) What it was each juror heard, saw or read concerning the matters referred to in 'a'.

"(c) What effect the reading, seeing or hearing of such matter had on the juror.

"(d) Whether the fact that the jury was sequestered will have any effect on his ultimate judgment.

"Explanatory Note

"The inquiries under 'a' refer of course to matters of those concerning which testimony was given in open Court."

motions were offered again to the court and the document or documents do not appear among the original papers transmitted to this court under our Rule 16(1).[16] We conclude as a matter of fairness that the three written motions should be considered by this court as if they were before the court below on May 25 and were considered then by that court for the first time. This will require us to discuss again some of the aspects of the subjects set out in the motions at other points in this opinion as will hereinafter appear.

Assuming, therefore, that the grounds for a mistrial handed up by Provenzano's counsel to the court on Saturday, May 25, 1963, were as set out in footnote 15 *supra*, upon consideration we find them to be without merit. Request (1) of the first motion, if granted, might immediately have prejudiced the Government's case since it is conceivable that jurors, even though they are men sworn to do their duty in an official capacity, nonetheless might entertain some hostility against a person or persons who caused them prolonged confinement. The second request was equally ill-advised. To instruct a jury that a case is not to be given "any special treatment" or awarded special "importance" would serve to heighten undesirable speculation respecting the importance of the case rather than to quiet it. Grounds (3) and (4) were substantially complied with by the court below, though somewhat modified as we shall see hereinafter. Ground (5) clearly would have been

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[16] Rule 16(1) of this court provides: "Original Papers to Constitute Record on Appeal. Appeals from the district courts . . . in all cases, civil and criminal, . . . shall be heard on the original papers, which papers shall constitute the record on appeal."

prejudicial to the United States, a party to the suit as much entitled to a fair trial as was Provenzano.

The second motion was for a mistrial on the ground of prejudice. It may be that the killing of Glockner received wide publicity in connection with Provenzano and his trial. But to say that sequestration of the jury could not possibly have the effect of keeping that story from the jurors, is to engage in manifest speculation. Implicit in our discussion on this aspect of the case, is the view that the precautionary measures taken by the court below were sufficient to render insubstantial any question concerning the possibility that the jurors read or heard any matter likely to be prejudicial to Provenzano before the end of the trial. The second motion was without merit.

The third motion, that to have the court make a private inquiry of each juror and ask him or her the questions set out in the motion, if employed as a method of investigation during the course of the trial, might well have built up such an atmosphere of suspicion about Provenzano and his relations to Dorn Company and the Teamsters' Union as to render a fair trial for Provenzano almost impossible. The facts and circumstances of this case make it sufficiently clear that the court below did not abuse its discretion in refusing to grant this motion[17] at the time or times when apparently it was offered.

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[17] There is no evidence in the record and nothing was offered to the court below showing that newspapers and broadcasts reported the Glockner affair, let alone intimated that Provenzano might be involved, *prior* to the time that the jurors were cut off from outside sources of information. Particularly in view of counsel's persistence in pursuing his objections in regard to this aspect of the case, it is not unreasonable to assume that if positive evidence to this effect had

On the morning of May 27, 1963, before the jury returned to the court room, the trial judge stated that he had decided to relax some of the restrictions he had theretofore imposed in sequestering the jury. He stated: "To a limited extent and under censorship the jurors will be permitted to see some television programs and to see some newspapers. The television programs will be monitored. The newspapers will be screened so that in connection with television programs or newspapers nothing will come to the jury which could possibly create any impression from an outside source with respect to the issues here, the testimony or any other developments. I want to bring that to the attention of counsel. Also I might add generally a program has been developed which will afford the jurors the maximum convenience, both in the way of recreation when they are out of the court and in other respects appropriate [sic] consistent with the objective of insulating them from any information that would in any way be prejudicial either to the Government or the defendant in this case, and appropriate in-

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Footnote 17—continued:

in fact existed, it would have been brought forward for consideration by the court. In stating the foregoing we are not unaware that Provenzano's counsel offered the front page of the Newark Evening News of Friday, May 24, 1963 at about 2:00 P.M. on that day to the Judge for his perusal. We cannot find this document in the record and counsel for Provenzano has not reproduced it in his appendix or made any contentions with respect to it or based on it on this appeal.

It is also worthy of note that during his summation to the jury, Mr. Singer said the following: "Do you know anything about Provenzano that is not on the record, that you have not heard here in the courtroom or seen here in the courtroom? Any one of you? Do you know anything about this case that you have not heard or seen here in the courtroom?" The Government asserts in its brief on this appeal, that these questions were asked "slowly and deliberately to the jury." Whatever the manner of the questioning, no juror responded.

structions have been issued to the marshal in connection with this."

Provenzano's counsel then and on several later occasions during the trial requested that the court put on record the instructions which it had given the marshal respecting the sequestration of the jury. These requests were rejected by the court. As we view the record the instructions of the court to the marshal as to the matters which the jury might be permitted to read or hear appear with sufficient clarity from the typewritten transcript itself. There was no error or prejudice here.

Provenzano's counsel on the morning of May 27 next urged again the granting of the "written application made on Saturday morning [May 25] with regard to interrogating each juror in private", the third motion set out in note 15 *supra*, and also urged that the jury be permitted to see no television programs and that reading any newspapers with portions clipped therefrom would be prejudicial. The court denied this oral motion. Provenzano's counsel also asked again that the jurors be interrogated individually as to what they had heard outside of the court room respecting Provenzano and the trial. This oral motion was also denied. The court pointed out that the jury had been sequestered on the morning of the Glockner shooting and had been cut off "from every outside source of information". The court then called the jury back to the court room and explained in general terms the necessity for the restrictions which had been imposed on them.

Another oral motion for examination of the jurors separately was made at the close of the Government's case,

when Provenzano moved for a judgment of acquittal, pursuant to Rule 29, Fed. R. Crim. Proc., 18 U.S.C.

We find no error in what the trial judge did and said in respect to these matters on the occasions related.

In his motion for an arrest of judgment and for a new trial, Provenzano cited for his fourteenth ground the following: "The Court erred in denying the applications (handwritten and typewritten) submitted in writing with respect to the interrogation of the jurors before they were sequestered . . ., and which applications were renewed a number of times during the trial. . . . A request was then renewed specifically for the direct interrogation of each juror by the Court . . .,[18] and the Court erred in denying the motion to interrogate or to instruct the jurors as requested. The denial of the motion for a mistrial made in connection with the request for such interrogation and the sequestration of the jurors was error." As we ruled previously no error was committed by the court below in denying the motion for a mistrial. We further state that no error was committed by the court below in denying Provenzano's motion for an arrest of judgment and for a new trial. Finally, the issue of whether or not Provenzano was prejudiced by the court's refusal to declare a mistrial or to allow an examination of the jurors separately was attempted to be brought up for the last time by the same document set cut in note 15 *supra*, entitled as we have said, "Defendant's Additional Requests to Charge". It should be noted at this juncture that the motion is stated in the present tense as if the jury were sitting and the trial was

[18] This was an apparent attempt of incorporation by reference of the motions set out in note 15 *supra*.

in progress and is phrased, as we have already pointed out, as if to cause the trial judge to sequester the jury and to have him state to the jury the reasons for their sequestration and that that sequestration was at the request of the Government and not because of any act of Provenzano. The so-called request for charge also contains a motion for a mistrial and this is based on a recapitulation of some of the reasons set forth in the motions referred to in note 15 *supra*.

This paper was filed on July 12, 1963, at 2:25 P.M. The jury had brought in its verdict and had been discharged with the thanks of the court some days earlier. The jury *qua* jury no longer existed and its individual members had returned to their homes. What is as extraordinary are the facts that Provenzano had been sentenced on the same day at 11:45 A.M. and had taken an appeal to this court five minutes later, at 11:50 A.M. The court below was without power to receive the paper since it no longer had jurisdiction of the cause.

The trial was a comparatively long one and the record is far from scanty. Not only the appendices but the whole transcript has been examined with care. Other points have been raised by Provenzano but we are of the opinion that they do not require discussion. We find no prejudicial error.

The judgment of conviction will be affirmed.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,614

UNITED STATES OF AMERICA

vs.

ANTHONY PROVENZANO

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

BIGGS, *Chief Judge*, and HASTIE and SMITH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed July 12, 1963 of the said District Court in this case be and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

June 30, 1964

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14614

UNITED STATES OF AMERICA

vs.

ANTHONY PROVENZANO

Appellant

SUR PETITION FOR REHEARING

Present:

BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges*

The petition for rehearing filed by Anthony Provenzano, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ BIGGS
Chief Judge

Dated: July 28, 1964

Order Extending Time to File Certiorari Petition

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1964

ANTHONY PROVENZANO,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 26, 1964.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States.

Dated this 18 day of August 1964

APPENDIX C

Additional Excerpts from Trial Transcript

(581) WALTER A. DORN, called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Boylan:

* * * * *

(643) (Examination of Mr. Dorn by Mr. Singer out of the presence of the jury.)

* * * * *

(652) The Court: Well, I would like to ask this question. Of course, as each of you know, by order of the Court to produce, it becomes the Court's function to examine in camera to determine how much is related to the testimony of the witness given on the stand. My first question is this—speaking in terms of the time it will take to read—is there any portion of this record to which reference is made—statements, minutes, and so forth—

Mr. Boylan: Yes.

The Court: —that the Government will turn over?

Mr. Boylan: Yes.

The Court: All right. Then just turn over to counsel all that you have no objection to turning over and the remainder I will take and examine in camera to determine the extent to which counsel for the defendant will be entitled to have it.

* * * * *

(653) Mr. Boylan: We would like to turn over to you, if we might, for your own, before we get to

that, the Grand Jury testimony, since we believe that unless some particular is shown, that Grand Jury testimony which is dated April 26, 1960, in Newark, New Jersey, and July 11, 1962, in Washington, D.C.—

The Court: Very well.

(Handed to the Court.)

* * * * *

(656) AFTERNOON SESSION

(Whereupon the following takes place out of the hearing and presence of the jury):

Mr. Boylan: If your Honor please, in your absence, your Honor, we gave to the defendant those documents that we had in our possession and we are obtaining one or two which he requested pursuant to Section 3500 of Title 28, and we're having others prepared for him. I also mentioned to counsel, subject to the Court's approval, that we might put on Mr. Brady, who is here from Albany, and would like to get back to his home town and to his practice. We have had him here for a day or two.

The Court: I have one question, Mr. Boylan I have read rapidly through the minutes of the Grand Jury for the District of Columbia and the minutes of the Grand Jury of the District of New Jersey, setting forth the testimony of Walter A. Dorn, and it does seem to me upon rapid reading of these minutes with very few exceptions the testimony is related to the testimony of the witness on the stand. Now, there may be some minor exceptions which at

first flush do not appear to be too serious. I will be glad to go over these more slowly before making a (657) decision as to what is to be given to defense counsel, but I was just wondering whether you felt that there was any subject matter covered in that testimony which would be so remote that it wouldn't be the proper subject of inspection. If you do feel that way I will go over these more analytically. I have read them. I have been reading constantly from the time we recessed until the time we returned to the bench, and I managed to cover them but I did read rapidly.

Mr. Boylan: My purpose was not in submitting them to the Court on the question of relevance to direct. I quite agree, whatever is in the transcript of the Grand Jury in Washington, it is certainly related to the subject matter, and in that sense falls within either the first or second paragraph of Section 3500. There is, however, a policy in this district as opposed to the second—or a conflict between this district and the second.

The Court: As to release.

Mr. Boylan: As to release of Grand Jury minutes, and I would not want to release it in view of the holding in the Third Circuit. I am quite aware in the Second Circuit—and particularly where the subject matter is one person's testimony it is so important that as a matter of course in the Southern (658) District this material is turned over. So that was my primary purpose. I have no quarrel with

the relationship between this material and what was testified to on the stand.

The Court: I know of no restriction upon the exercise of sound discretion by the Court in making these available.

Mr. Boylan: If the Court should see fit.

The Court: If it appears to the satisfaction of the Court that justice requires release.

Mr. Boylan: There is no restriction as such. It is completely upon the discretion of the Court. Of course, that discretion has been subject to what they call the Pittsburgh Plate Glass Doctrine, that some showing be established. I would suggest this, rather, if we can, if you would take the time to read the material more closely, I might be in a position tomorrow or at the end of this hearing today to say that I have no objection to the release of that Grand Jury testimony.

The Court: Very well. I will hold it in the interim in view of the fact that you have another witness to proceed with and it won't become necessary, so I think probably Mr. Singer has enough reading material to cover, so that some delay won't matter.

* * * * *

(659) The Court: I will try before the day is ended to dispose of all this matter on Grand Jury minutes so you will have adequate opportunity to prepare yourself for cross examination.

* * * * *

Appendix C—Additional Excerpts from Trial Transcript

(729) RAYMOND F. LINDQUIST, having been previously duly sworn, was recalled and testified further as follows:

* * * * *

Cross Examination by Mr. Singer (Continued):

* * * * *

(742) (The jury retired from the courtroom.)

The Court: Counsel, is there anything else?

Mr. Singer: You said I could have that Grand Jury testimony tonight to read. You thought you might be able to give that to me.

The Court: I am not fully prepared yet to make a decision on that in view of the fact that you indicate you may be hours with this witness.

Mr. Singer: I hope not.

* * * * *

(786) The Court: You can proceed with the cross examination of Mr. Dorn.

Mr. Singer: All right.

The Court: I would like to add, Mr. Singer, that I am just about through with the comparison of the transcript and the Grand Jury minutes, and as of this time it does not appear that I am going to make them available to you, but I just have a matter of a few more pages to go.

Appendix C—Additional Excerpts from Trial Transcript

WALTER A. DORN, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Singer:

* * * * *

(823) The Court: Counsel, I will act at about ten minutes to 2:00. I will be ready to rule on your request to inspect the minutes of the Grand Jury proceeding in this district and the minutes of the Grand Jury proceedings in the District of Columbia in connection with the testimony of Mr. Hoeting and in connection with the testimony of Mr. Dorn.

Mr. Singer: I am going to ask your Honor to await your ruling on this until I am through with this cross examination. I may come into the field of (824) contradiction on that, but as far as Mr. Hoeting, your Honor has already heard his testimony on the particular subject.

The Court: Court is recessed until 2:00 o'clock.

* * * * *

(826) WALTER A. DORN resumed and testified further as follows:

Cross Examination by Mr. Singer (Continued):

* * * * *

(883) Q. Did you ever testify or make any statement that there was any discussion with Mr. Provenzano about

drivers refusing to back into doors or bays? A. I believe I did.

Q. You did? Did you testify to it before the Grand Jury in this court? A. I wouldn't know where I might have testified to it.

Q. Did you testify to it before the Grand Jury in April of 1959—April of 1960 when you were called as a witness in this district, to that very fact? A. I don't know.

Q. Would looking at it help you refresh your (884) recollection? A. Certainly.

Mr. Singer: I ask that the witness be shown that portion of his testimony of April—

The Court: The request is denied.

Mr. Singer: I respectfully except.

* * * * *

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No. 534

In the Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 534

ANTHONY PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B; R. 197b-231b)[1] is reported at 334 F. 2d 678.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1964. A petition for rehearing was de-

[1] "R." refers to the printed appendices filed in the court of appeals. Numbers with the suffix "a" refer to pages in the appellant's appendix; numbers with the suffix "b" refer to pages in the appellees' appendix. Twelve volumes containing the original papers and the typewritten transcript ("Tr.") are also on file with the Clerk.

nied on July 28, 1964. By order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to and including September 26, 1964. The petition for a writ of certiorari was filed on September 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the circumstances of the case, petitioner was properly charged with a single offense of affecting interstate commerce by means of extorting a continuing series of monthly payments, instead of being charged with a separate offense for each monthly payment.

2. Whether the trial court, after examining in camera the grand jury testimony of three witnesses, abused its discretion in refusing to turn the testimony over to the defense.

3. Whether the cross-examination of a witness was improperly restricted when the trial court sustained a general objection to a question by petitioner's counsel.

4. Whether the evidence was sufficient to establish petitioner's intent to extort.

5. Whether there were errors in the instructions.

6. Whether the trial court erred in sequestering the jury to shield it from potential publicity adverse to petitioner, and, after the materialization of such publicity, whether it erred in denying petitioner's motion for a mistrial without interrogating the sequestered jurors to determine if in some way they had obtained knowledge of the incident publicized.

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

In a single-count indictment filed in the United States District Court for the District of New Jersey, petitioner, an officer of the International Brotherhood of Teamsters, Local 560, was charged with obstructing commerce from January 1952 to June 1959, by extorting $17,000 from Dorn's Transportation Inc., and from Walter A. Dorn, an officer thereof, in violation of 18 U.S.C. 1951. Petitioner was convicted by a jury, sentenced to imprisonment for seven years, and fined $10,000 (R. 768a). The court of appeals unanimously affirmed (Pet. App. B).

1. On January 1, 1952, Dorn's Transportation, Inc. ("the company"), a general cartage firm engaged in interstate commerce, moved one of its trucking terminals from New York City to a site in Secaucus, New Jersey (R. 175a-176a, 249a). That same day, petitioner and one Anthony Castellito, both business agents [2] of Teamsters' Local 560 (R. 253a, 608a), appeared at the terminal, presented the manager with a contract, and asked him to sign it (R. 175a-176a, 186a-187a). The manager sent it to Walter A. Dorn—then a vice-president of the company, owner of 15% of the stock, and brother of the founder (R. 230a, 265a, 327a)—at the company's home office (R. 177a, 187a). Dorn executed the contract on behalf of the company (R. 251a).

Shortly after the signing of the contract, the company was informed that petitioner wanted a named employee assigned full-time to a particular yard operation (R. 177a-178a, 189a; 23b). The company asserted that the yard operation in question did not require a full-time employee (R. 193a, 235a; 25b). After two meetings with petitioner and a trucking association representative, the company agreed to the request (R. 178a-179a, 191a, 233a-235a; 25b-26b).

Within a few weeks a second labor problem arose. The drivers refused to back their vehicles into the terminal bays and "break" the trailers from the tractors (R. 149a, 153a, 196a, 213a-214a, 220a-222a, 226a; 28b-29b), as had been the practice until that

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[2] Petitioner became president of Local 560 in 1958 (R. 652a).

time (R. 153a, 159a, 180a, 183a). For about four to nine weeks the terminal yard was in a state of congestion (R. 153a, 155a, 160a-161a, 181a-182a, 220a), the operation was slowed down (R. 160a, 133a, 214a), and expenses rose (R. 241a). The company "had a continual problem" (R. 241a). Company officials attributed the congestion to the drivers' refusal to back into the bays; union officials, to the inadequacy of the facilities.[3] In an effort to resolve the dispute, Dorn, the terminal manager, and a trucking association representative, met with petitioner and Castellito (R. 235a-236a, 340a). Two meetings ended without progress (R. 236a-237a, 341a). Finally, at a meeting with petitioner and Castellito, Dorn said he could not live with the situation and asked if it could not be straightened out (R. 238a). They replied that Dorn "would have to see them to get it straightened out" (R. 238a). Dorn was then led to understand that they "were talking about the price of a man * * * approximately $100 a week" (R. 238a). Dorn said he "needed time", explaining that he was not in control of the company, and that he had neither the authority nor the means to make such payments (R. 238a-325a). At a second meeting of the three at a restaurant, Dorn agreed to do the best that he could (R. 239a), and, in his understanding, "committed [himself] to a hundred dollars a week" (R. 239a-240a), if "they could find a method for [him] to do it" (R. 244a, 385a). In the latter part of May or

[3] Numerous drivers testified for the defense they did not refuse to back in and that the congestion was caused by inadequate facilities.

June, 1952, Dorn again met petitioner and Castellito at the restaurant and paid petitioner $350 to $400 cash in the mens' restroom (R. 231a, 239a, 329a). Over the next fifteen months Dorn met petitioner at the same restaurant on three more occasions, each time paying him $350 to $400 cash in the mens' room (R. 231a-232a, 320a, 329a). The money was drawn from Dorn's personal funds without the knowledge of others in the company (R. 327a). Dorn testified that he felt payment was "necessary to the operation of [the] business", which had suffered as a result of the previous congestion (R. 240a-241a).

In the second quarter of 1953, during a meeting at the restaurant, petitioner told Dorn "I have a lawyer for you" (R. 245a)—a lawyer whom Dorn "could put on retainer" (R. 242a). Petitioner handed Dorn a slip of paper on which was written the name and address of one Michael G. Communale (R. 232a-233a, 241a-243a, 382a-383a), an assistant prosecutor of Hudson County, New Jersey (R. 390), who maintained a private law practice at an office located a few doors away from various teamster offices in a Jersey City building (R. 390a, 417a-418a, 658a-660a). Dorn, who had corporate authority to retain an attorney (R. 334a), understood this to be "the method of making the payment that [he] had committed [himself] to make at the second meeting in 1952" (R. 385a-386a). He stated to petitioner that a New York attorney was retained by the company at $200 a month (R. 243a). Petitioner made no specific demand concerning the amount of the fee (R. 243a),

and the matter was not discussed further (R. 381a; 37b).[4]

As a result of the conversation (R. 245a), Dorn sent Communale a letter dated August 10, 1953, requesting that he accept a retainer from the company (R. 371a; 194b-195b). Payments to Communale had already been initiated; from June 1, 1953, through June 1, 1959, $200 checks,[5] drawn on a company account for legal expenses, were mailed to Communale monthly (R. 69a-72a, 233a). Some of the checks were deposited in trust accounts; the rest were cashed (R. 411a-413a; 40b-41b). During this period Dorn never met or spoke to Communale. He knew of no legal service performed by Communale, and he never instructed anyone in the company to use his services[6] (R. 218a-219a, 242a, 245a-246a, 291a). The company's legal matters, including matters involving New Jersey operations, continued to be handled by the New York attorney whom the company had retained since 1944 (R. 246a, 258a-260a). When asked why he made these payments to Communale, Dorn replied "I felt that it was necessary for the continuance of the terminal (R. 249a).[6]

---

[4] A few months later, after Communale had been retained, the cash payments were terminated at Dorn's request (R. 247a). Dorn continued to meet petitioner at the restaurant several times a year in order to conduct normal company-union business (R. 247a-248a).

[5] The checks for September 1953 through January 1954 were in the amount of $400 each (R. 296a).

[6] Communale testified that he considered the payments by the company as a legitimate retainer (R. 417a), which he had received through the intercession of a disbarred at-

By letter dated April 5, 1957, Dorn informed Communale that the company wished to discontinue the retainer and thereafter employ his services on an individual case basis (R. 288a). Communale responded that such an arrangement would be satisfactory (R. 288a-289a). The monthly payments, however, were continued without interruption until June 1, 1959 (R. 70a, 295a).

From 1952 to 1959, the sole labor difficulty between the company and Local 560 which required mediation arose in January 1959 (R. 659a-660a; 132b). Between 1960 and 1962, eight such incidents occurred (R. 659a-660a, 133b-134b).

2. During a hearing on various pre-trial motions, the government attorney moved that the jury be sequestered and insulated from possible publicity in order to protect the "integrity" of the case and the position of petitioner, whose "misguided" friends might "seek to do things in the course of a trial which would only be to his detriment, but over which

---

torney, since deceased, who worked in his office (R. 406a-407a, 414a-417a). He stated that during the period of the payments he made a "superficial inquiry" concerning the pendency of a transportation tax bill in the New Jersey Assembly, but that it involved "no actual work" and that he did not inform the company of his inquiry (R. 391a-392a); that he once inquired of the New Jersey Secretary of State if the company was a New Jersey Corporation (R. 395a, 400a), apparently for his own information prior to listing the company as a corporation in his office directory (R. 290a-291a); and that in reply to a routine letter from the company's auditors he wrote that neither he nor anyone else, to his knowledge, had any unsettled claims against the company (R. 283a-284a).

he would have no control" (R. 40a-43a). The court reserved decision (R. 46a). Thereafter a jury was empaneled and sworn (Motion Tr. 59). After the government's opening statement the court excused the jury until the next day, and specifically admonished that no juror was to permit himself to receive "any information whatsoever" about the case "by any means whatsoever" (Tr. 14-15). Upon defense request, the court further ordered the jurors to refrain from reading anything in the newspapers relating to the case, and to avoid any source of information relating to the case (Tr. 15). The jury was directed to return the next day, Friday, May 24, 1963, at 10:00 a.m. (Tr. 15-16).

Trial resumed the next morning with the testimony of the first witness (R. 67a; Tr. 26). At 12:15 p.m., the beginning of the noon recess, the marshall, pursuant to orders of the court, placed the jurors under sequestration (R. 74a-75a, 79a, 138a). The afternoon session then began with a side-bar conference at which the government attorney stated that earlier in the day[3] one Walter Glockner, the shop steward at Dorn's Transportation, Inc., and a member of Teamsters' Local 560, had been shot and seriously injured[4] in front of his home, and that versions of the incident, which had been given to the Hoboken police but apparently had not been made avail-

[3] The only indication in the record concerning the time of the shooting was the statement of petitioner's counsel that it occurred between 6:00 and 6:30 a.m. (R. 139a).

[4] Glockner later died.

able to the press (R. 75a-77a), had implicated petitioner and Local 560 (R. 75a). The government attorney stated he had refused comment to the press, except to acknowledge at 9:00 a.m. that Glockner was to be interviewed that day as a potential witness (R. 76a). The government then renewed its request for sequestration (R. 76a), apparently unaware that it had already been effected. The defense opposed the motion, suggesting that they wait to see whether any prejudicial news stories developed, and, if not, continue with the trial (R. 76a-77a). Petitioner's counsel added that "A lot of rumors don't disturb me a bit" and that he could "take care of the rumors" in his closing statement (R. 77a). Shortly thereafter, an afternoon newspaper with an account of the shooting was presented to the court (R. 78a). The court then announced that, upon considering all the circumstances, it had previously ordered the jury sequestered, and stated that the order would continue in effect throughout the duration of the trial (R. 79a-81a). The sequestration thereafter continued on a 24-hour-a-day basis (R. 193b). Although they had initially been prohibited access to periodicals, radio, and television (R. 129a), the jurors were later permitted to read some edited periodicals and to watch some monitored television programs (R. 135a-136a).

Petitioner's counsel moved for a mistrial on the ground that the jurors might have been exposed to prejudicial publicity concerning the shooting before the order of sequestration, and also that they might in some way have been exposed after sequestration (R. 80a, 83a, 85a, 473a, 755a). Additionally, he

moved for interrogation of the jurors concerning their knowledge of the matter (R. 83a, 85a, 136a-137a, 474a, 755a-756a). The court denied both motions (R. 81a, 138a-139a, 474a-475a), pointing out that the sequestration had been implemented prior to any publicity of the incident (R. 138a), and that under the measures taken to assure effective isolation of the jurors it was "absolutely impossible for them to be exposed to any source of outside contact" (R. 146a). Petitioner's counsel also requested that the jury be informed that the sequestration was imposed at the instance of the government, not the defense (R. 83a, 85a, 754a-755a). Instead, the court informed the jury that the sequestration was ordered because the court felt such action necessary (R. 140a-141a).

ARGUMENT

1. The indictment (R. 7a-8a), as supplemented by the bill of particulars (R. 12a-13a), properly charged petitioner with a single offense—affecting interstate commerce by extorting a series of monthly payments. There is no basis for petitioner's suggestion that he should have been charged with a separate offense for each monthly payment. Unlike *United States* v. *Tolub*, 309 F.2d 286, 289 (C.A. 2), in which the court of appeals upheld convictions under multiple counts where the evidence disclosed that "[e]ach payment proceeded from a separate extortion," the evidence in the present case showed no separate and distinct extortion preceding each monthly payment of Communale's retainer. As noted by the court below, the "payments

were the consumation of the extortionate scheme which was a single and unified one" (Pet. App. B, 15a). And, contrary to petitioner's assertion (Pet. 28), the jury was properly instructed that "the defendant in this case may not be convicted of any offense charged by this indictment unless the offense was committed during the period of time between November 15, 1955 and June 1, 1959" (R. 699a), and that, in order to convict, the jury must find that the payments "subsequent to November 15, 1955 were the product of fear instilled in Walter A. Dorn by the defendant with intent that payments pursuant thereto be made not only prior to November 15, 1955, but to be continued thereafter" (R. 701a).

2. The trial court did not abuse its discretion in declining to make available to the defense, for purposes of cross-examination, the grand jury testimony of three government witnesses, as there was no indication of any "particularized need." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400. Numerous documents reflecting earlier statements by Dorn, the primary government witness, were tendered petitioner pursuant to 18 U.S.C. 3500 (R. 253a-257a). His cross-examination was extensive (265a-337a, 349a-357a, 371a-385a, 387a-389a). Additionally, at defense request, the court examined the grand jury testimony of all three witnesses and concluded that the withholding would not be detrimental to petitioner (R. 357a-358a, 361a-362a). Quoting from *Pittsburgh Plate Glass Co.* v. *United States*, *supra*, at 400, concerning grand jury proceedings, the court stated:

> "To make public any part of its proceedings would inevitably detract from its efficacy. * * * [N]ot only would the participation of the jurors be curtailed but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused." [R. 362a.]

The court then noted:

> I think that passage has particular application to this case. [R. 362a.][9]

In any event, the matter was not raised in the court below, and there are no "exceptional circumstances" warranting initial review by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

3. The cross-examination of Dorn was not improperly restricted. Dorn was asked whether petitioner had made any demands after the payments to Communale had begun and after Dorn had told petitioner that he could not continue the cash payments. Dorn replied that he had not. Petitioner's counsel then asked, "So that any arrangement that you had to pay him money ended when you said you wouldn't pay it any more in 1954, isn't that right?" (R. 333a). Government counsel objected without specification of grounds, and the court sustained the objection.

That ruling was correct. As the court of appeals noted, the question was not only vague and argumentative, but it called for the opinion of a layman as to

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[9] The court elsewhere noted the apparent reluctance to testify on the part of witnesses for both the government and the defense, and observed that fear seemed evident in their demeanor (R. 190b-191b).

whether the contract had come to an end—a legal conclusion which lay within the province of the court. (Pet. App. B. 23a). In any event, petitioner's counsel elected not to reframe the question, or otherwise to pursue the matter further.

4. There was ample basis for the jury's determination that petitioner intended to extort the payments to Communale. The $100-a-week payments, Dorn explained to petitioner and Castellito, were beyond his personal means, and he simply agreed to do the best that he could until a method was found for him to meet the demand. When petitioner gave him the name of a lawyer to retain, Dorn had no doubt but that this was "the method" (R. 386a). There was no other explanation for petitioner's action. The fact that the monthly payments were sent to Communale, not petitioner, was relevant in considering the issue of intent, and the jury was so instructed (R. 695a), but it did not preclude a finding of extortion under 18 U.S.C. 1951. *United States* v. *Green*, 350 U.S. 415, 420.

5. The various objections to the charge are without merit.

a. The trial court, after instructing the jury to consider all the evidence (R. 691a, 693a), and after calling its attention to the conflicting testimony concerning the reason for the congestion at the terminal, charged that if petitioner were found to have effected such congestion the jury might consider whether that circumstance was "one which reasonably generated fear on the part of Walter A. Dorn" (R. 711a). Petitioner now claims as error the fact that the court

did not also specify as relevant "the evidence of the friendly relationship between Dorn and petitioner, and the absence of any threats or demands by petitioner in the post-limitation period" (Pet. 31). It was entirely proper, however, for the judge to focus upon the issue of intimidation raised by the evidence of congestion, without referring in detail to all of the surrounding circumstances in light of which that issue must be appraised.

b. Equally without merit is the contention that the trial court erred in refusing to instruct the jury to acquit petitioner if the payments by Dorn were found to have been offered as a bribe, rather than extorted. There was no evidence whatever suggesting bribery; the defense built its case, not on the ground that the payments to Communale represented a bribe, but on the ground that no such payments were negotiated or received by petitioner (R. 619a-620a, 622a, 624a, 627a, 639a, 154b-155b). Since the jury was clearly instructed that, in order to convict, it must find that the payments were induced by wrongful use of fear (R. 694a-695a, 698a-699a, 701a-702a, 711a), there was no occasion to introduce the question of bribery. *Bianchi* v. *United States*, 219 F. 2d 182, 192-193 (C.A. 8), certiorari denied, 349 U.S. 915. An instruction on a crime not charged would merely have confused the issue. *United States* v. *Blount*, 229 F. 2d 669, 671 (C.A. 2).

c. The trial court committed no error in instructing the jury that it might find commerce affected if the resources of Dorn's Transportation, Inc., a business engaged in interstate commerce, were depleted

by extorted payments of money (R. 695a, 696a, 711a). Petitioner argues that such an effect on commerce is too slight, and implies that an actual interruption or stoppage of commerce is necessary to bring 18 U.S.C. 1951 into play (Pet. 13). Such a construction would wholly defeat the purpose of the Act, which speaks in broad language, manifests "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion", and "outlaws such interference 'in any way or degree' ". *Stirone* v. *United States*, 361 U.S. 212, 215. The exaction of money from a company engaged in interstate commerce is itself a sufficient interference with commerce to come within the proscription of the Act. *Anderson* v. *United States*, 262 F. 2d 764, 770 (C.A. 8), certiorari denied, 360 U.S. 929; *Hulahan* v. *United States*, 214 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856. This is especially true in a case like the present one, where the jury might reasonably find that a serious interruption to the flow of goods was the consequence with which Dorn was threatened if he refused to pay. Plainly, the victim of extortion need not actually endure the threatened consequences of non-payment in order for the statute to be applicable.

d. The trial court did not err in charging, with proper elaboration, that the jury might consider petitioner's guilt as an aider and abettor under 18 U.S.C. 2 (R. 696a-697a, 725a).[10] Petitioner asserts that

[10] The Reviser's Notes concerning 18 U.S.C. 1951 state that the former words "or acts in concert with another or with others" were omitted as unnecessary due to the applicability of 18 U.S.C. 2.

the evidence did not sufficiently suggest petitioner's collaboration with others to justify such an instruction. But the commission of the offense, and the participation of Communale and Castellito in certain aspects thereof, was plainly established. Communale, by petitioner's direction, was the recipient of the extorted payments. Castellito accompanied petitioner at the time the cash payments and the later retainer payments were originally induced.[11] Petitioner could have been found a collaborator, aider, and abettor of either or both. Consequently, the submission of the case to the jury on this theory, employing language quoted with approval in *Nye & Nissen* v. *United*

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[11] The following excerpt from petitioner's testimony on direct examination (R. 622a), which suggests an attempt to avoid responsibility for acts which might have been performed by Castellito, is itself sufficient justification for an instruction on aiding and abetting.

Q. Was there ever any understanding with you that Dorn had committed himself to pay you a hundred dollars a week or to Castellito, if it was possible to pay that much?
A. No, Sir, You are talking about Anthony Provenzano?
Q. I'm talking about you, when you were present.
A. In my presence?
Q. Yes.
A. No, sir.
Q. Did you ever make an agreement with Dorn or did Castellito or anybody else make it when you were there that Dorn should pay even a penny?
A. In my presence?
Q. Yes, Sir.
A. I'm answering for Anthony Provenzano. No, Sir.
Q. Did Dorn ever commit himself to pay any money to anybody in your presence?
A. In my presence, no, sir.

States, 336 U.S. 613, 619 (R. 697a, 725a), was appropriate. See *Meredith* v. *United States*, 238 F.2d 535, 541-542 (C.A. 4). The fact that the indictment was not framed in terms of aiding and abetting is immaterial. *United States* v. *Washington*, 287 F.2d 819, 821 (C.A. 7), certiorari denied, 366 U.S. 969.

In any event, as noted by the court below (Pet. App. B. 27a), petitioner's present objection to the instruction was not raised at trial. There he complained only that the terms of the instruction permitted a finding of guilt if petitioner were found to have associated himself in the venture without knowledge thereof, and that the instruction could not be given where no one else was charged in the indictment as a principal (R. 719a, 724a-725a). Neither of these grounds was meritorious and neither is now urged. Petitioner did not, at trial, raise his current objection that the evidence failed to warrant the giving of the charge, and certainly he did not apprise the trial court of such a ground with the specificity required by Rule 30, F. R. Crim. P.

6. The court did not err in sequestering the jury to shield it from potential publicity concerning collateral matters which might prove prejudicial to petitioner. Indeed, subsequent events (the news stories publicizing Glockner's shooting) demonstrated the wisdom of the court's decision. As every provision was made for the jurors' comfort and convenience (R. 79a-80a, 136a, 141a), and as the court informed the jurors that the sequestration was ordered because the court deemed such action necessary (R. 140a-141a), there is no basis for the inference that petitioner was prejudiced by the move.

Nor was it error to deny petitioner's motion for mistrial based on later news stories regarding Glockner's death, or his request that the jurors be interrogated.[12] Although the shooting occurred before the jurors were isolated, they had previously been instructed to avoid any information relating to the case (Tr. 14-15), and they were formally sequestered before the shooting was publicized. As noted by the court of appeals:

> There is no evidence in the record and nothing was offered to the court below showing that newspapers and broadcasts reported the Glockner affair, let alone intimated that Provenzano might be involved, *prior* to the time that the jurors were cut off from outside sources of information. Particularly in view of counsel's persistence in pursuing his objections in regard to this aspect of the case, it is not unreasonable to assume that if positive evidence to this effect had in fact existed, it would have been brought forward for consideration by the court. [Pet. App. B. 41a-42a, n. 17.]

And after sequestration was ordered, the trial court noted that it was "absolutely impossible for [the jurors] to be exposed to any source of outside contact" (R. 146a).[13]

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[12] The question proposed by petitioner's counsel to begin the requested interrogation, linked petitioner and Local 506 with "a murder" and "F.B.I. investigations" (R. 474a). The question was so prejudicial to petitioner that it might, if asked, have required reversal of his conviction. See *Marson* v. *United States*, 203 F. 2d 904, 908 (C.A. 6).

[13] In none of the cases cited by petitioner for the proposition that the news publicity required interrogation of the

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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October 1964

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jurors (Pet. 25-26), were the jurors isolated from outside contact.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 534

ANTHONY PROVENZANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AS AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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The American Civil Liberties Union of New Jersey, hereinafter called the "Union", respectfully moves for leave to file a brief amicus curiae in this case. The attorneys for petitioner have consented to the filing; as of this writing no response has been made by the attorneys for the respondent. The consent has been filed with the Clerk of the Court.

The Union is a state subdivision of the American Civil Liberties Union, a national non-political organization devoted solely to defending the civil liberties guaranteed by federal and state constitutions. The New Jersey chapter is organized for the same purpose with special emphasis on problems arising in New Jersey.

The Union is interested in the instant case, because it believes that the prosecution in this case did not constitute a fair trial of the petitioner in that petitioner may have been prejudiced by adverse publicity via various media of communication as a result of an incident which occurred on the morning of the second day of trial. The increasing impact of the influence of publicity on the capacity of a Court to conduct a fair trial is a matter which concerns the Union deeply, and whose legal implications should be determined by this Court.

The Union is not unaware of the fact that this Court does not favor amicus curiae briefs in support of certiorari petitions. However, unless the petition for certiorari is granted there will be no opportunity to submit on the merits its views with respect to the major issue herein involved, to wit: Should not petitioner have been granted the right to question the jury as to whether any of its members had been influenced by the events of the morning of trial, and the communication of these events to such juror by the method in which the communication had been received?

Statement of the Case.

Anthony Provenzano was an officer of Local 560, International Brotherhood of Teamsters and as such was charged with extortion in violation of 18 U. S. C. Sec. 1951 (The Hobbs Act). The trial commenced on Thursday, May 23, 1963. The day was taken up with various motions and resumed on Friday, May 24, 1963. At 6 o'clock that morning (139a) one Walter Glockner, a shop steward of the company against whom the extortion was alleged to have been practiced, was shot to death. At 2 o'clock, when the trial resumed, the matter was formally brought to the attention of the trial court. The government attorney stated to the Court

> "Now, we have been besieged by the press with respect to Mr. Glockner's participation, if any, in this trial, and what his relationship is to the case. We have declined to give any comment at all. The only statement I gave at 9:00 o'clock this morning was that—this was in connection with this case—it is a fact that Mr. Glockner was to be interviewed by our office today and as a potential witness. I say potential."

It is undisputed that thereafter motions were properly addressed to the trial court to poll the jury as to whether any of them had become aware of the episode prior to coming to Court that morning or at any time thereafter. The motion was denied. The jury was sequestered but permitted to have access to television and newspapers which the trial court stated had been censored (135a):

"The Court: I have decided with respect to the jury to relax some of the restrictions heretofore imposed, because I have reached a conclusion that all of them are not necessary. To a limited extent and under censorship the jurors will be permitted to see some television programs and to see some newspapers. The television programs will be monitored. The newspapers will be screened so that in connection with television programs or newspapers nothing will come to the jury which could possibly create any impression from an outside source with respect to the issues here, the testimony or any other developments. I want to bring that to the attention of counsel."

Reasons for Granting the Writ.

This Court has over the years delineated the essentials of a fair trial. Citation is obviously not necessary to remind this Court that it has admonished the states as to the right of counsel in both capital and non-capital criminal cases, as to the freedom from unreasonable search and seizure, the prohibition against cruel and unusual punishment, as to the improper use of confession and as to the impropriety of commenting on the defendants failure to testify in his own behalf. Certainly the elements of a "fair trial" include the right to an unprejudiced jury, if trial by jury is to be really had.

In this case, the impact of a barrage of mass communication media on a trial actually in progress must be appraised. While it is clear that the record does not too clearly describe the exact content of the radio, television and newspaper broadsides, the trial court's attention was

directed to the fact that the murder of Glockner was described as having been carried out by persons interested in petitioner's cause (137a):

> "* * * I'm certain the Court has read, seen and heard, since Friday morning concerning this unfortunate incident and the alleged arrest of somebody whom they said was Mr. Provenzano's brother-in-law, and that was a straight out-and-out distortion of fact—as a so-called material witness, and all of that is entirely—and some statements made by the Prosecutor's Office in Hudson County, alleged reports of F.B.I. agents, and the entry of the F.B.I. agents and the Attorney General into this matter * * *"

Under these circumstances, while it is entirely possible that all of the jurors somehow miraculously escaped receipt of the communication via radio, television and the newspapers prior to their sequestration, the statistical improbability is so manifestly great that the defendant should have been permitted to make due inquiry as to the possibility of such influence.

The habit of persons in the United States today to read morning newspapers with their breakfast, or to be listening to radio broadcasts both at home and in their cars is so universal and general, that a high degree of probability exists that one or more of the jurors were in receipt of this communication; that the use of television in the morning is less general may be conceded, but that it exists in some measure can not be denied. In any event more than ample justification existed for the defendant's motion to make inquiry of the jury as to whether any of the jurors had in fact received this communication and the impact

thereof. The importance of a full examination of jurors as to whether prejudice has been caused by newspapers or other publicity has been fully recognized. *Marson* vs. *United States*, 203 F. 2d 904 (1953); *Blumenfeld* vs. *United States*, 284 F. 2d 46, 8 Cir. (1960), cert. den. 365 U. S. 812.

In *United States* vs. *Dioguardi*, 20 F. R. D. 33 S. D. N. Y. (1956), Judge Edelstein, in considering a motion to dismiss an indictment because of prejudicial publicity, after condemning the publicity which had ensued; nevertheless, pointed out that the proper way to handle the effect of the publicity would be to determine on the voir dire what the effect on prospective jurors had been and whether irreparable damage had been caused.

Of course in the instant case trial had commenced and a separate examination should have been permitted to consider the impact on the jurors then sitting.

It would seem the government is here caught in a peculiar dilemma. While of course the process of preparing a trial is costly and time consuming, and cases should be heard when they reach the proper place on the calendar, one of two things must emerge. If the inquiry revealed that prejudice had been caused the defendant by virtue of the murder and its communication, then of course the petitioner was entitled to a mistrial and a postponement; if the inquiry demonstrated that there had been no prejudice the case could have gone on. The basic issue then, is whether a defendant in a criminal case does not have the right to examine the effects of adverse publicity on a jury, when that publicity occurs during the progress of a trial; and the only way in which it can be determined whether the jury has been influenced is by an examination of the jury itself.

An important consideration in this case, too, is the fact that the trial court undertook to censor the television programs and the newspapers which the jury was permitted to see and read. This was done by instruction to the marshall (135a). Whatever instructions were so given to the marshall were not revealed to counsel for the defendant and the court refused to acquaint counsel with those instructions (137a).

The situation here is not greatly different from the problem raised in *Gideon* vs. *Wainwright*, 372 U. S. 335 (1963). In that case counsel for the State of Florida argued that it was not essential for a fair trial in a criminal case that a defendant be represented by counsel, if the trial judge takes pains to help him. See *The Making of Justice*, by James E. Clayton (1964), page 136 et seq. The argument of course was rejected. It may well be that the trial court in its instructions to the marshall gave exemplary instructions, but no one will ever know, certainly not petitioner. Obviously all elements that are materially involved in the administration of the trial should be communicated to the person whose liberty is to be effected by the results of the trial. Whether the instructions given by way of monitoring television programs could and did prevent news bulletins which are suddenly flashed from coming to the attention of the jury, or whether newspapers with obvious deletions did in fact prevent the jury from learning about the case from sources outside competent evidence can not be ascertained. In short there is no way that the defendant in this case can determine whether the jury was influenced by testimony or evidence de hors the courtroom. For the events occurring on the morning of the second day of the

trial not to have influenced the jury, one must rely on a great statistical improbability; and for the events which occurred thereafter and during the progress of the trial one must rely on the infallibility of a trial judge without any possibility of scrutinizing his actions. As Mr. Justice Stewart succinctly commented in answering a contention made during the oral argument in *Gideon, supra,* that a trial judge would see that a defendant without counsel would get a fair trial "I assume all that you are saying is true, but the judge's job is to be a judge, not a defense counsel." *Clayton, supra,* p. 137. In either case the Union does not believe the requirements of a fair trial were met.

Conclusion.

By reason of the foregoing the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Opinion Below

The opinion of the Court of Appeals (Pet., App. B), is reported at 334 F. 2d 678.

Argument

1. Question relating to the element of interference with commerce (Pet., pp. 11-14).

The question here presented is, *not*, as suggested by the Government (br., p. 16), whether an *actual* obstruction of interstate commerce must be shown, but whether it is essential for the jury to find, on sufficient evidence, in order to satisfy the jurisdictional element of interference with commerce, that there was at least a *threatened* obstruction of commerce and that "*commerce was saved from such a block-*

age by [the victim's] compliance with [the defendant's] coercive and illegal demands''. See *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

The Government urges the adoption of the novel concept applied by the courts below that the mere payment of money through extortion by a company engaged in interstate commerce is itself a sufficient interference with commerce. No such concept has heretofore been advanced in Hobbs Act prosecutions, and the cases cited by the Government (*Anderson* v. *United States*, 262 F. 2d 764, 770 [8th Cir. 1959], cert. den. 360 U.S. 929; *Hulahan* v. *United States*, 214 F. 2d 441, 445 [8th Cir. 1954], cert. den. 348 U.S. 856), in no way stand for that proposition. It was there held merely that it was not necessary to show an *actual* obstruction of commerce—a proposition with which petitioner does not quarrel. Neither case disputes that separate and apart from the element of extortion, there must be a finding of acts on the part of the defendant constituting at least threatened interference with interstate commerce, as this Court ruled in *Stirone* (361 U.S. at 215).

In an attempt to bolster its position, the Government urges that on the record in this case ''the jury might reasonably find that a serious interruption to the flow of goods was the consequence with which Dorn was threatened if he refused to pay''. The Government, however, completely ignores the crucial consideration that that issue was not submitted to the jury at all (Pet., pp. 12-13). The bulk of the trial was devoted to the congestion issue, and petitioner presented a strong defense on that issue, but the Trial Court erroneously charged the jury that the evidence of congestion did ''not bear directly'' on the issue of interference with

commerce (711a),[1] and thereby removed from the jury's consideration an essential element of the crime and deprived petitioner of a vital facet of his defense.

2. Questions of knowledge, intent and aiding and abetting (Pet., pp. 14-18).

A

The Government's brief (p. 14) is significantly silent with respect to the significance of the absence of any evidence to show that petitioner in any way conspired or collaborated with Communale or even knew him, or had any knowledge that Communale was receiving retainer payments without rendering services therefor, or that Communale was retained or receiving payments at all, or that petitioner intended or contemplated that Communale was to be retained on any such basis, or that petitioner derived any direct or indirect benefit from such payments.

The Government further ignores Dorn's own unequivocal testimony that though he and petitioner met on many occasions after he allegedly received Communale's name from petitioner, no mention was ever again made of Communale's name or of the retainer arrangement or payments at any of such meetings; that he never told petitioner that he was sending checks to Communale; that petitioner had nothing to do with the increase of the monthly retainer payments for a short period from $200 to $400; and that there was no discussion between them of the matter of Dorn's sending Communale the letter terminating the retainer arrangement in April, 1957 (Pet., pp. 9-10).

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[1] Figures in parentheses followed by the letter "a" refer to the pages of petitioner's printed Appendix in the Court of Appeals. Figures preceded by the letters "Tr." refer to the pages of the original typewritten transcript of the trial minutes, which is on file with the Clerk of this Court. Emphasis throughout is supplied.

The Government's basic reliance is on Dorn's testimony that when petitioner allegedly gave him Communale's name, Dorn related the incident in his own mind to his conversation with petitioner of about a year earlier when he had allegedly said that he would "do what [he] could", "if there was a way [he] could do it", to meet what he testified was merely an "understanding" in his own mind that he had "committed himself" to the payment of $100 a week (244a, 372a, 238a-240a, 326a).

Dorn made it clear, however, that he said nothing about this to petitioner and that nothing that petitioner said led him to that conclusion (387a). Manifestly, the undisclosed functioning of Dorn's mind at the time, howsoever relevant to show his fear, would not suffice as proof of petitioner's intent. The Government's contention (br., p. 14) that "There was no other explanation for petitioner's action", amounts to nothing more than an impermissible resort to conjecture and suspicion in place of evidence. Cf. *Ingram* v. *United States*, 360 U.S. 672, 680 (1959).

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As regards the Trial Court's charge on aiding and abetting (Pet., pp. 16-18), there is no merit to the Government's contention (br., p. 17) that that charge was proper at least insofar as it might have reference to Castellito. The charge advised the jury that they could find petitioner guilty on the theory of having aided and abetted another to commit the crime charged in the indictment "without proof that he personally did every act constituting the offense charged" (696a-697a). In that context the charge clearly referred solely to Communale. It had no relevant application to Castellito, since Castellito was not shown to have committed any act that was not committed also by peti-

tioner (see 321a-322a). Indeed, Castellito was not present at all when petitioner allegedly gave Communale's name to Dorn (279a). The excerpt quoted by the Government (br., p. 17, n. 11) from petitioner's testimony, affords no support for the Trial Judge's charge on aiding and abetting, since there was no evidentiary basis whatever for a finding that Castellito did anything in connection with the matters at issue in which petitioner did not also personally participate.

Contrary to the Government's mere say-so (br., p. 17), there was likewise no evidentiary basis—and the Government cites none— for any finding that Communale was a principal in the alleged crime, or in any way conspired or collaborated with petitioner or even knew him, or knew that petitioner had anything to do with the retainer. By contrast, in *Meredith* v. *United States*, 238 F. 2d 535 (4th Cir. 1956), on which the Government relies (br., p. 18), there was ample evidence to support a jury finding that the third parties to whom the aiding and abetting instruction applied had themselves committed the crime charged of making false entries and "were principals in the commission of a crime" (pp. 542-3).

There is likewise no merit to the Government's further contention (br., p. 18) that the question cannot be considered by this Court because it was not properly raised at the trial. This Court thus clearly has "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412 (1947); *Silber* v. *United States*, 370 U.S. 717, 718 (1962). Nothing could be plainer error and more prejudicial to a defendant's substantial rights than an instruction permitting the jury to convict him on the basis of the acts and

knowledge of a third person who is in no way shown to have conspired or collaborated with him.

Further, it has been recognized that Rule 30 of the Federal Rules of Criminal Procedure is to be given a practical construction, with due regard to its purpose of giving the Trial Court an opportunity to correct possible error (*United States* v. *Currens*, 290 F. 2d 751, 759 [3d Cir. 1961]), and "does not require a lawyer to become a chattering magpie" (*United States* v. *Kelinson*, 205 F. 2d 600, 601-2 [2d Cir. 1953]). Its requirements are relaxed where the Trial Court is sufficiently aware of the party's position. *Cf. United States* v. *Kelinson, supra; United States* v. *Currens, supra;* see also *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904, 905-6 (2d Cir. 1942).

In the present case defense counsel advised the Trial Court that he was excepting to "that portion of your charge with regard to aiding and abetting wherein your Honor said that guilt may be established without direct proof of knowledge of the crime on the defendant" (719a)—obviously a reference to the basic thrust of the judge's charge, permitting the jury to find guilt on the theory of aiding and abetting "without proof that . . . [the defendant] personally did every act constituting the offense charged" (696a). Associate defense counsel further made it clear that the objection was to the "charge *on the theory of* aider and abettor" (724a, 725a), and he specifically called the court's attention to its error in charging petitioner as a possible aider and abettor of Communale as a purported principal (724a). Indeed, the Trial Judge himself suggested that counsel enter a "general exception" to the entire charge (722a). It is thus hypertechnical for the Government here to urge that petitioner is foreclosed from

raising the question in this Court because his counsel did not spell it out with absolute precision at the trial. See *United States* v. *Currens, supra,* 290 F. 2d at 759; *Golden* v. *United States,* 318 F. 2d 357, 360 (1st Cir. 1963).

3. Access to Grand Jury Testimony of Key Government Witnesses (Pet., pp. 18-22).

The Government has completely failed to meet the issues raised in the petition. Its assertion (br., p. 12) that "there was no indication of any 'particularized need' ", is refuted by the record (Pet., p. 19). Contrary to the Government's claim (br., p. 12), the mere fact that other statements given by Dorn were made available to petitioner, and that Dorn's cross-examination was extensive, affords no basis for denying petitioner access to Dorn's relevant Grand Jury testimony. The Government further begs the question by citing the Trial Court's decision to withhold the Grand Jury testimony, after reviewing the same, on the ground that "the withholding would not be detrimental to petitioner."

Lawn v. *United States,* 355 U.S. 339, 362-3, n. 16 (1958), on which the Government relies (br., p. 13), is distinguishable, since the question there sought to be raised was not even mentioned in the petition for certiorari. The *Lawn* case is further distinguishable since it would have been futile for petitioner here to raise the question relating to denial of access to Grand Jury minutes in the court below, in view of the strict and narrow approach taken on the question by that court, whereas the *Lawn* case arose in the Second Circuit, which has a far more liberal rule in that regard (see Pet., pp. 21-2).

4. Sequestration of the Jury (Pet., pp. 22-26).

There is no merit to the Government's contention (br., p. 18) that petitioner could not have been prejudiced by

the sequestration order because provision was made for the jurors' comfort and convenience, and the court informed the jurors that it had ordered the sequestration because it had decided that it was "necessary for the appropriate performance of your function as jurors in this case" (140a-141a). The Government ignores the potential for prejudice inherent in a sequestration order, in causing the jury to speculate that it is attributable to some questionable conduct on the part of the defendant or his counsel, and that the case on trial is for some reason one out of the ordinary. The Trial Judge indeed at one point advised counsel that he would instruct the jury "fully" in his charge that they were not to accord the sequestration order any special significance (129a-130a), but he failed to do so, though so requested by defense counsel (752a).

The Government's other contentions (br., p. 19) are all premised on the assumption that the jury was completely insulated from the prejudicial publicity, even though there was a distinct possibility that some of the jurors heard an early morning newscast concerning the incident prior to their coming to court, and even though the jurors were permitted to see monitored television programs which would not insulate them from spot news broadcasts. It would have been a simple matter for the court, as requested by defense counsel, to interrogate the jurors *in camera* to ascertain whether any of them had read or heard any of the prejudicial publicity.[2]

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[2] The Government (br., p. 19, n. 12) urges that the question proposed by petitioner's counsel for the requested interrogation of the jurors contained objectionable language. The question which it cites was one proposed by petitioner's counsel at the close of the Government's case (474a), by way of renewal of repeated requests for such interrogation which he had earlier made. The earlier requests (755a-756a, 83a, 136a-138a) did not contain the allegedly objectionable matter.

5. Unit of Prosecution (Pet., pp. 26-28).

United States v. *Tolub*, 309 F. 2d 286 (2d Cir. 1962) cannot be distinguished, as urged by the Government (br., p. 11), on the ground that the evidence there showed that "each payment proceeded from a separate extortion". Tolub was convicted on twelve counts, ten of which related to ten $100 weekly payments made between August 23 and October 25, 1955. The $100 weekly sums, together with earlier similar payments (on which prosecution was barred by limitations), had been paid pursuant to a single extorsive agreement made in 1952. As Judge Friendly pointed out in a concurring opinion, there was "no evidence of any repetition of threats by Tolub between August 23 and October 25, 1955, and only the vaguest evidence as to how the ten $100 weekly payments during that period were made" (309 F. 2d at 290). Applying the principle of cases involving situations "where each of many acts forwarding a single underlying purpose was a separate offense", the Court held that Tolub's acceptance of each $100 payment "during the continuance of the same underlying conditions was a separate act of extortion" (309 F. 2d at 289). The *Tolub* situation was thus entirely analogous to the case at bar.

Contrary to the Government's assertion (br., p. 12), the Trial Judge's charge, including the excerpt quoted by the Government, did not clearly advise the jurors that they could convict only upon finding that the payments made in the post-limitation period were themselves impelled by fear;[3] it instead directed the jurors' attention only to the

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[3] The Government's statement of facts (br., p. 7) implies that Dorn testified that he made all the payments to Communale because he felt "it was necessary for the continuance of the terminal". The record

question whether the original retainer agreement in the pre-limitation period was procured by fear, and permitted them to convict merely upon finding that payments made in the post-limitation period were the product of the original retainer agreement (701a-702a).

6. Restriction of cross-examination (Pet., pp. 28-30).

The Government's contention (br., pp. 13-14) that the question to which objection was sustained was improper as calling for a legal conclusion, has already been dealt with in the petition (pp. 29-30). The question was clear and precise, particularly in the light of the questions and answers which preceded it (331a-333a), and it cannot be dismised as "vague" or "argumentative"—objections nowhere suggested at the trial.

Nor may the Court's error in sustaining the objection be disregarded because of defense counsel's failure to pursue the matter further. *Cf. Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (2d Cir. 1952). Indeed, the Trial Court admonished defense counsel on a number of occasions not to continue to pursue any line of inquiry to which objection had been sustained (Tr. 990, 869, 913, 921).

7. Reasonable fear (Pet., pp. 30-31).

While the Trial Court on a number of occasions during the charge instructed on the issue of fear as an element of extortion (695a, 698a, 701a, 702a, 711a), it nowhere charged that the inducing fear must be a reasonable one under all

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reference cited by the Government (249a) shows, however, that the answer quoted by it was in response to a question which asked, "What was the reason which made you make the payments *in the first place*, Mr. Dorn?"

the circumstances presented. The Government (br., pp. 14-15) has completely failed to meet that issue.

8. Refusal to submit issue of bribery (Pet., pp. 31-32).

The Government's contention (br. p. 15) that there "was no evidence whatever suggesting bribery", is refuted by the record (Pet., pp. 31-32). Nor is it material, as urged by the Government, that petitioner denied that he received any of the payments in question. The rule is thus well settled in the Federal courts that a defendant is entitled to "instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility". *Tatum* v. *United States*, 190 F. 2d 612, 617 (D.C. Cir. 1951); *United States* v. *O'Connor*, 237 F. 2d 466, 474 (2d Cir. 1956); *Perez* v. *United States*, 297 F. 2d 12, 15-16 (5th Cir. 1961).

The cases cited by the Government are readily distinguishable. In *Bianchi* v. *United States*, 219 F. 2d 182 (8th Cir. 1955), cert. den. 349 U.S. 915, the Trial Court did instruct the jury, as requested by the defendant, that the mere receipt of money or other thing of value by a union representative from an employer would not of itself be sufficient to constitute an offense under the Hobbs Act (p. 192). Similarly, in *United States* v. *Blount*, 229 F. 2d 669 (2d Cir., 1956), the Trial Court did charge the jury on the issue of bribery (p. 670).

CONCLUSION

For the reasons set forth above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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